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A MANUAL OF ROMAN
PRIVATE LAW

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A MANUAL OF ROMAN PRIVATE LAW

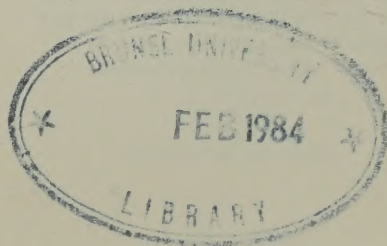
By

W. W. BUCKLAND, LL.D., F.B.A.

OF THE INNER TEMPLE, BARRISTER-AT-LAW,
REGIUS PROFESSOR OF CIVIL LAW IN THE
UNIVERSITY OF CAMBRIDGE, FELLOW OF
GONVILLE AND CAIUS COLLEGE

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PREFACE

THIS book, being designed for the use of beginners, aims at setting forth the main principles of the Roman Law of classical and later times, without detail and without discussion of the many difficult problems involved in a more advanced study of the subject. Recent years have seen much progress in our knowledge of the classical law as opposed to that of Justinian: many received opinions have been shewn to be incorrect and many others to be doubtful. An attempt has therefore been made to embody the most important results of research, so far as they seem to be established and so far as they affect the broad principles with which alone such a book as this can deal. In an introduction the student's attention is directed to some of the fundamental notions which underlie the rules, but all that the writer has been able to do, in the space available, is to deal very summarily with a number of very difficult questions.

References to the sources are few. References to modern literature are wholly excluded. This is a hazardous method, for errors are sure to have crept in, and the book gives no means of checking the statements made. But an apparatus of notes would have greatly increased the size and cost of the book, and the plan has been adopted of providing the student with a short list of accessible larger works which will provide him with all that he needs under this head.

Thanks are due to many friends for assistance, especially to Dr D. T. Oliver, of Trinity Hall, who has read the whole manuscript and made many valuable suggestions, and to Dean Pound, of Harvard, who rendered the same kindness in respect of the Introduction, which deals in great part with topics on which he is far more qualified to speak than is the writer. Thanks are also due to the Secretary and Staff of the Cambridge University Press for their unfailing courtesy and care.

W. W. B.

July 1925

SHORT LIST OF BOOKS
CONTAINING FURTHER INFORMATION
AND REFERENCES TO THE SOURCES

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LIST OF ABBREVIATIONS IN REFERENCES

- C. Codex of Justinian.
D. Digest of Justinian.
In. Institutes of Justinian.
N. Novellae of Justinian.

These references are to the Berlin stereotyp edition.

- C. Th. Codex of Theodosius.

References are to Mommsen's edition.

- Coll. Collatio Legum Mosaicarum et Romanarum.
G. Institutiones of Gaius.
P. Sententiae of Paul.
U. Regularum liber singularis of Ulpian.
V. Vatican Fragments.
Fr.D. Fragmentum Dositheanum.

These references are to the texts printed in Girard, Textes de Droit Romain, 5th ed. The texts can also be found in the Berlin *Collectio librorum iuris anteiustiniani* and in the *Fontes Iuris Romani anteiustiniani*, edited by Riccobono, Baviera and Ferrini.

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INTRODUCTION

EVERY civilised community is governed by rules of conduct enforced upon its members by organised Society. These rules are the Law. But, in our complex life we obey many varieties of rule, and not all of these are law in the sense in which we are concerned with it. The rules of cricket are not part of the law. In modern life groupings are numerous, and in any modern community the central organisation which we may call the State is only one, though it is doubtless the most important, of the social and political organisations which affect the life of the ordinary citizen. The other organisations have their rules: some of these will be enforced by the Courts of Law and some will not. Of those which will be so enforced if occasion arises, it is not always easy to say whether they are laws enforced as having remotely behind them the authority of the State, or mere agreements enforced under a rule of law that men shall keep their contracts. Thus, though in practice it is not usually difficult to say whether a rule put before us belongs to the law or not, it is not easy to define "law" in terms which express that common quality which all "law" has and no other rules have. The difficulty is not avoided even if we waive the question of International Law and seek only for the *differentia* of the law which is to be found in organised civil communities. In this country the doctrine dominant in the nineteenth century was simple. There is, it was said, in every civilised community a central authority which can lay down what laws it will, which can veto the commands of any other authority, and which is not under the orders of any other body. That authority is the Sovereign. The rules which it lays down are the Law. But though this analysis can be fairly well applied to the classical and later Roman Law and to our modern English Law, it is not universally true. The laws of the Medes and Persians, it was said, could not be changed. In early Rome the laws of the XII Tables were thought of as a body of rules which no one had authority to set aside. It was not till late in the seventeenth century that the omnipotence of Parliament became a generally accepted doctrine in this country. There are States in which rules of law exist which

no standing authority has power to alter, and he would be a bold prophet who asserted that even in this country the omnipotence of the legislature was certain to endure for ever. As no one will deny that the law of other communities and other ages is a phenomenon of the same kind as our own, a definition which excludes them is unsatisfactory. The objection may also be taken that even if we seek only a definition valid for, say the Law of the Roman Empire, this definition, even if it be sound, tells us but little about the law. This objection, however, as stated, is hardly tenable. We must not expect from a scientific definition more than the *differentia* of the thing defined. The scientific definition of *Equus* is, so Professor Gardiner tells me, "a warm-blooded, hairy, ungulate perisso-dactyle, vertebrate mammal." This does not give us a vivid picture of the animal. But the objection can be put more effectively. The definition, it may be said, contains a *suggestio falsi*: it suggests that the legislator acts arbitrarily, but, in reality, he does not. Even where what he enacts cannot be disputed by any authority, it is not true that he is unchecked. Even an autocratic Emperor is controlled by his surroundings: there are things he dare not do for fear of a revolution. He can, if he chooses, enact this undesirable thing, and it will be law. If the effect is to cause a revolution, that is no doubt an important historical fact, but it merely confirms our definition, for there was no way of getting rid of this undesirable enactment except by destroying the political society and setting up another. What are we to say if a new law is made and there is no revolution, but it is simply disregarded? Most communities possess some of these "dead letter" laws. The answer seems to be that, apart from oversight, the non-enforcement of such a law is commonly due to causes similar to those which prevent the enactment of some laws, the fear of revolution, or, more commonly, in democratically governed countries, the fear of ejection from office of the party in power. This does not affect the validity of the definition. But the real difficulty remains that no such definition is anything like universally true.

In democratically governed communities, and most communities are now-a-days at least to some extent so governed, the legislature of the moment is the mouthpiece of the majority, and expresses, more or less adequately, the general will. But if we proceed to

define law as the expression of the general will as to rules of conduct to be enforced on members of the community by an organ devised for the purpose, we have first the difficulty that only extreme intellectual agility will bring within our definition, the law of, say, Czarist Russia, which, nevertheless, was certainly law. It was an analogous difficulty in arriving at a definition of a State which led such a thinker as T. H. Green to the remarkable conclusion that Czarist Russia was "not worthy of the name of a State," was "a State only by courtesy." A definition which excludes the law of monarchical communities will hardly serve our turn. There is the further difficulty that an elected legislature may, on occasion, (it not unfrequently does), enact something which is not what the community desires. It is impossible to see in this an expression of the general will, except by the circular device of defining the general will as that which is enacted by the legislature. This really brings us back to the "command of the sovereign" of the nineteenth century, and tells us of course no more about the essential character of law than we found in that definition. If the legislature is not purely arbitrary in its action, but is influenced by the will of the people, that will also is not arbitrary. It expresses a purpose. The State exists for a purpose to which the law is a means. What is that purpose? It is not the maintenance of order, for order is but a means to the end. In truth, the purpose of the State is variously conceived by different thinkers. For some it is the maintenance of justice, and no more. For others it is the happiness and well-being of members of the Society. For others it is self-development, self-realisation, i.e., it is the business of the State to lay down such rules as shall enable the citizen to attain the best of which his nature is capable. But these views do not directly concern us. These writers are really defining the ideal State, not analysing the State as it is, here and now. Few of them have the courage to take T. H. Green's attitude and declare that an organisation of Society which does not aim at what they think the true end is not a State at all.

Another school of writers, not less philosophical, but keeping closer to actual fact, turn their attention to the present working State and its legislature. Professor Dicey in this country, and Dean Pound, of Harvard, lecturing in the older Cambridge and studying a wider field, have shewn not merely that change in law

is controlled by public opinion, but that, in the course of history one purpose, one impulse, becomes dominant after another, each in its turn, and that the legislation of each age represents in general the thought of that age. It is no doubt true that "through the ages one increasing purpose runs," but it would be very difficult to prove it from the Statute Book. The obvious conclusion from this is that if we are to include in our definition of law, its purpose, we shall need a new definition every few years. Legislation represents, but only imperfectly, the dominant ideals of the moment. It may indeed be said that these are only subordinate ideals. Behind them lies the real aim, the principle at which these are strivings. To give this any force, it would have to be shewn that these divergent and often conflicting aims do indeed somehow converge on the remoter aim, however conceived, but it does not appear that any philosopher has ever undertaken to shew this. But, indeed, to the philosopher, all this is beside the mark. He might say that it is true that legislators make mistakes, fail to see the right ideal, fail to legislate on the right lines even when they do see it, but this does not alter the fact that there is a right purpose at which our imperfect intelligences are groping. This may well be true: it is to be hoped that it is. But it does not shew, what is material for us, that all existing law does express this purpose.

This is not to say that the lawyer, as such, can afford to neglect these considerations. No system of law is or can be complete. New and unforeseen combinations of fact are constantly arising which present legal problems to which the existing rules offer no decisive solution. When such a situation arises, the orthodox or professional explanation of what happens is that, of the rules which seem nearly to govern the case, one or other is extended by analogy so as to include it. Where even this resource fails we are told that the courts are guided by "justice, equity and good sense." It is however clear that in applying either of these methods the moral ideals which hold sway at the moment will play an important part. Thus the lawyer cannot ignore them, but since they vary, and vary very rapidly, any attempt to introduce them into a definition of law as it is must be misleading.

Some recent literature seems to ignore these rather important considerations. A school of writers having its headquarters in France, but with disciples in this country seeks to get rid of all

notions of compulsion and of sovereign power. For them, the sovereign is a mere machinery for effecting the social purpose, however conceived, and the law is the sum of the rules introduced to that end. The sovereign's powers are limited by the social purpose: any act which does not serve that purpose is *ultra vires*, any law conflicting with that purpose is void. So far as this expresses an ideal, there is no reason, at least for present purposes, to quarrel with it. But it is sometimes expressed, quite unequivocally, as a description of the present sovereign and the present law. Unfortunately there are in most systems unjust laws, some that were always unjust, while others, beneficial at their inception, have become unjust through change in circumstance. Yet, though there may be communities in which no act of the legislature, or of the executive however authorised, is necessarily binding on subjects or the courts, he would have been a bold man who maintained that view under Justinian, and it is not true in English Law. Thus, for our purposes, we are free from the necessity, which rests on the authors of such speculations, of defining the social purpose and the means for its identification, so as to give something a little more stable, a little more constant, than the "cadi justice" of half civilised potentates.

It should however be observed that it is only in so far as they are addressed to communities governed by the Common Law that these writings can be regarded as dealing purely with ideals. It seems to be a part of the doctrine of these writers that the conception of the State as a machinery of public service, the validity of its acts being conditioned by their conformity to the social purpose, is to be regarded as the actual existing state of things. Whether this is so in any community, whether anywhere the courts will refuse to apply a law on the avowed ground that it is contrary to the public good, we need not consider: it is, at any rate, not so in Great Britain, nor was it so in Rome. It is indeed true that in some States, notably the United States of America, a Court will refuse to apply a statute on the ground that it is contrary to the Constitution, but that is only an appeal to a statute of higher authority: it really involves no judgment on the merits of either the statute rejected or the Constitutional provision with which it is in conflict.

Neither social purpose nor general will seems helpful for framing

a definition of law from the point of view of the pure lawyer. And it must be remembered that the wider the field which a definition is intended to cover the fewer will be the elements in the definition, since the fewer will be the elements common to all the objects and not common to others. A white horse needs a longer definition than a horse. A definition wide enough to include the Law of Rome from the XII Tables to Justinian and the English Law from the Conquest to the present day cannot tell us much. The main common element is compulsion. But we are all liable to compulsions which are not legal, and the question remains how, and by whom, we are compelled to observance of the rules which we call Law. The answer seems to be that the compelling force is the organised community, and the machinery is the tribunals existing in the community under its authority. This is substantially the definition given by Frederic Harrison and differs little from that which we owe to Sir Frederick Pollock. It has at first sight a circular look, for it tells us that law consists of rules enforced by tribunals set up by the State, and that the tribunals are bodies set up to enforce the law. This circularity however is only apparent. The law and the court of law are two ideas which have in a sense no significance except in relation to each other: they are related in much the same way as centre and circumference.

Courts of law, however, are not all created by the central authority directly: they may be set up by subordinate authority and only indirectly by the State. How are we to distinguish such courts from others equally authorised remotely by the State, which administer rules which we do not think of as the law, e.g., the M.C.C. or the Jockey Club? We can easily exclude bodies which unfortunately exist in all communities and have ways of enforcing their rules which are often contrary to law. Their rules are not law because the organised community will not enforce them. As to the former group Sir John Salmond found a historical answer. Courts of law began as courts of justice in an age when there was no law. Gradually, by legislation and otherwise, restrictions have been imposed on them. The rules administered under these restrictions are the law, and it is with courts in this line of descent that we are concerned. This does not throw us back on the conception of purpose, since, precisely because they must administer the law, whatever it may be, they are not inevitably Courts of

Justice, but courts of justice according to law, and that is not quite the same. But it may be true to say that, so far as bodies like the M.C.C. administer rules which are more than mere agreements between members, and so far as their rulings would be upheld by the central authority, they may be called laws. But they affect only a special section of persons and for the ordinary study of the law need hardly be taken into account. Until lately the laws of the Thames Yacht Club were placed with the lawbooks in the University Library.

We have assumed that the central authority and its laws are identifiable, and in most modern communities, this is so, as it was in the Roman system. There have indeed been communities in which it was hard to say whether the Church or the lay power was supreme; but in such cases, though it is not possible to find the uncommanded commander, it is still possible to recognise the courts of each authority and the law which they apply. There have also been times and places in which what professed to be the supreme authority was not obeyed, in which its mandates were disregarded and its courts either prevented from sitting or unable to give effect to their judgments. But in such revolutionary conditions, there is at the moment no real political organisation, though there may be one in the making. It is idle to analyse in such a state of things: what is true at one moment has ceased to be true in the next. It is like attempting to determine the chemical constitution of fluids in a test tube in the course of a reaction.

Though we found it necessary to exclude the conception of purpose from the definition of law as an existing thing, it must not be forgotten that in the main, in the long run, with however many lapses, errors and even wilful divergences, law has made for justice and for social wellbeing, as at the time conceived. It is law which has made possible the growth and continued existence of civilisation. And, as we have seen, law is being made from day to day in the law-courts by the lawyers. In every country, and especially in our own, every lawyer plays his part in legislation. One point after another is determined in the traffic of the courts, and no lawyer can be doing his duty if he fails to realise that the system in the administration of which he shares is the framework by which society is held together. This it can be only if it is respected, and

it will be respected only if it is worthy of respect. The work of development done in our system by the decisions of the courts, was, in Rome, effected by the skilled lawyers, in part by their writings, in part by their advice to officials and other consultants, and the texts give abundant evidence both of the importance of their share in the work and of their high sense of the responsibility which it imposed upon them.

The notion of compulsion which at present underlies the law may be outgrown. Many writers on political theory adopt a conception of the State which wholly dispenses with this notion. With their speculations we are not directly concerned, except, indeed, to observe that, as we have seen, they are apt to use language which implies that they are describing the existing state of things, while in fact they are really stating their views of an ideal future. For the Romans, as for ourselves, the law is a compulsory system. But it is not a compulsory code of morals, aiming at completeness. That the law does not require a certain act does not imply that the act is not incumbent on an honest man. "*Non omne*," says Paulus, "*quod licet honestum est*," and the same warning is to be found in other texts. Most systems of law, for instance, refuse to enforce certain agreements unless there is written evidence of them. This does not mean that the Society which has laid down the rule holds that there is no obligation to keep such promises when they are merely oral. It means that the Society holds, rightly or wrongly, that allegations of oral agreement in such matters are often fraudulently made, and that for this, and other reasons, it is best to leave them to the parties and to the moral sanction. In other words the law is not a system of rules which the citizen ought to observe in his dealings with other people, but a system of rules which, for reasons good or bad, the Society holds that the citizen ought to be made to observe. That is a very different matter. Many rules have no particular relation to morality. That a man should have notice of proceedings to be taken against him is only just. But, within wide limits, the exact number of days is morally indifferent. That there should be public holidays is no doubt good, but, apart from religious considerations, their dates are of no importance.

According to Justinian, following Ulpian, the most fundamental division of the law is into *ius publicum* and *ius privatum*. With the

former we have little direct concern, and we need not enter into the controversy whether this division is really fundamental or whether, as public law is mainly concerned with the creation, powers and responsibilities of officials, lay and priestly, it should not more properly be treated as a branch of the Law of Persons. It is enough to say that this latter mode of treatment, which handles the powers of the Praetor or the legislature, side by side with those of the lunatic and the minor, has little practical convenience, however logical it may be. It is to be noted that, for the Romans, public law included not only the functions of the legislature, the magistracy and the bureaucracy, in fact what we commonly call constitutional and administrative law, but also the criminal law. This was not because its administration was in the hands of officials, for this was true of the opening stage of all judicial proceedings, but because of the historical fact that in early Rome important criminal matters were actually decided by the public assembly and were on that account called *iudicia publica*. With the criminal law we shall not deal, but the legislative machinery in different ages must be shortly considered, and as the administration of the ordinary law, the *ius privatum*, was in the hands of the magistrates, we shall have from time to time to refer to them and their powers, especially those of the Urban Praetor, with whom was the administration of litigation. But these references will be merely incidental.

Rules of law are concerned with the results of legal events, i.e., of events which have or may have legal results. Though such events will commonly be acts or abstentions of human beings or groups, this is not necessarily so: a man may, e.g., be liable for damage done by his cattle without any reference to any act or omission of his own. An earthquake, by destroying property, may release a man from some obligation connected with the tenure of it. Death, perhaps the most important of legal events, is not, and need not be caused by, an act or omission. These "events" create or constitute, or modify, or destroy legal relations, and legal relations involve legal rights and duties. It has been well pointed out that modern writers on Roman Law stress another aspect of the matter, and speak, for instance, of the enforcement of a contract as the carrying out by the State of the manifested will of the parties. But it is clear that the Roman Law itself, like the common law,

looked on birth or contract or delict as creating a relation which had legal consequences. A determination of the will may be a necessary presupposition of some of these relations, but it is the relation itself which creates the rights and duties. So far as the event affects only one person, the private law is not concerned with it. The State, indeed, for various reasons, may impose penalties for conduct affecting directly only the doer, which is or may be *peccimi exempli*; but the private law, in general, deals only with rights and duties between those subject to the law. Thus an event, to afford material for legal discussion, must be such as to set up some legal relation between two persons, to create a right in *A* against *B*, a duty in *B* to *A*. Thus the law can be stated as a system of rights and duties, and it is usual, though not universal, to set it forth from the point of view of the rights rather than of the duties.

These rights are commonly regarded as divisible into two great classes, those available against every one, *iura in rem*, and those available only against a specific person or specific persons, *iura in personam*. Of the former, ownership is the most important: of the latter, which are of many varieties, the right arising from a delict may be taken as an example. The distinction itself is fundamental in Roman Law, though the expressions themselves are not found. The law is looked at by the Romans from the point of view of the remedies rather than of the rights. The remedy is the primary essential of a legal right and the whole Roman scheme of remedies makes fundamental the distinction between actions *in rem* and actions *in personam*. The name *actio in rem* is due to the fact that the most obvious right *in rem* is a right to a thing, ownership being the chief. But the important characteristic of the right involved is universality and it may exist in matters which have nothing to do with property. A man has a right *in rem* to personal liberty, and to his reputation, but these are not rights to a thing. The family rights of a *paterfamilias* are *iura in rem*, but they are not property: a son is not a *res*. It is true that in Roman Law, and still more obviously in our own, there are rights not easily placed under either of these two heads. It is true that a right *in personam* may generate a right against everyone: a contract may create a duty in all persons not to interfere with the performance of it. It is indeed contended by some writers that the distinction

is unreal; that a right *in rem* is merely a large number of rights *in personam*, that the essence of a right is the remedy and that in both cases equally the steps for enforcement must be taken against individuals. Whatever truth there may be in this conception in final analysis, it is impossible to study the Roman Law usefully without keeping in mind the distinction between actions *in rem*, to enforce a right available against persons generally, and actions *in personam* to enforce a right available only against a person or persons specifically determined. And it is not without interest to observe that the writers who deny reality to the distinction nevertheless appear to think it is necessary to retain it.

It has been said above that all rights are correlative to duties. This is plainly true of rights *in personam*, but it is not so obvious in regard to rights *in rem*, and it is sometimes denied. The rights involved in ownership are of two kinds. There is the right that others shall not interfere with the property and here the correlative duty is plain. But there are also the positive rights of exploitation. The owner may till the land, fell the trees, live in the house. In rights of this sort, sometimes called "liberties," the duty is not prominent, but it is there, since proceedings will lie against anyone who, without justification, prevents the exercise of the right. But there are other liberties in which the duty is still less obvious, e.g., the right to get up at six in the morning, to which however the same analysis is applicable. A more puzzling case is the so-called right to receive gifts. But here the puzzle seems to be created by a certain ambiguity in the terms. I have a right to receive a gift if one is tendered, but till there is one in view I have nothing that can be called a right, and there does not seem any purpose in calling it a liberty either: it is legally insignificant. It is like saying that a man has a liberty to jump a hedge which is not there. But if a gift is tendered to me and someone without justification prevents my taking it, that will commonly be an actionable wrong.

Almost any event may in appropriate circumstances have legal consequences, but (apart from death) the most important events with which we are concerned are transactions (*negotia*) and wrongs (*delicta*, torts). A *negotium* is not necessarily an agreement: it may be manumission of a slave, transfer of property, a will, or one of the many so-called quasi-contractual relations of which the honest

receipt of money really due to someone else is a simple instance. Much of the practical part of the law, after the facts have been ascertained is the analysis of *negotia*. It has to be considered what is the transaction indicated by the facts, and whether the form is such as the law requires for such transactions, and whether, failing this, the facts constitute some other relation. Form, however, is not the only requirement of a transaction. For it to be valid the parties must have legal capacity to engage in it, and in all communities there are persons whose legal capacity is limited. Lunatics, children, aliens, slaves, and subordinate members of a *familia*, all these had in Roman Law capacities differing from those of the normal citizen. In some cases, as in those of lunatics and children, the rules are a more or less reasonable recognition by the law of physical facts: in others, as in those of slaves, aliens, *filiifamilias* of full age, the variations are imposed by law for social and political reasons. The cases, and the rules, differ greatly in different communities. Roman Law had, as we shall see, very elaborate rules on the matter.

Assuming the transaction to have been effected in recognised form, between parties of sufficient capacity in law, there are still other requirements which must be satisfied before the law will enforce it or give compensation for failure to do what it calls for. Thus an undertaking to do what is impossible in the nature of things is in law a nullity, and if the performance becomes impossible after the undertaking, this becomes void in Roman Law, unless there was something in the facts which made this *casus* imputable to the party bound. What states of fact would produce this imputability will appear in our treatment of the law. Impossibility in law and immorality are on much the same footing. And where the undertaking is for something quite legal in itself, there may be an ulterior illegal or immoral object or intent, on the part of one or both parties, which vitiates it. This state of things, where one party is entirely innocent of the further purpose, may give rise to complicated problems. Again, some transactions, quite innocent in themselves, may be forbidden for extrinsic reasons. The housing question led to prohibition of dealings involving the pulling down of houses. Sales of corn were forbidden or restricted in times of scarcity. There were restrictions on the sale of poisons, etc.

A transaction, made in due form between parties who are *capaces*, and not in any way unlawful or impossible, may still be invalid. For in such transactions as transfers of property, contracts and the like, there is the further requirement of consent of the parties. It is true that in the early law, in the highly formal transactions of that age, each having its elaborate ritual, the form gone through was binding whatever the intention of the parties. Even in the law of the Empire, so far as these rituals remained in use the principle still held: they were binding in strict law, but there was equitable relief. For that age the obligatory force of the form apart from consent was unreal, and these ceremonial acts had practically disappeared in Justinian's law. Apart from this all transactions required consent, real consent, and it would therefore be necessary to ascertain in any given case whether there was anything in the facts to indicate that the apparent consent involved in going through the transaction was not a real consent. If the act was done under actual physical compulsion (*vis*), e.g., a man's hand was held and made to write a receipt, there was clearly no consent at all and the transaction was void. But this would be a rare hypothesis. If the consent was procured by threats (*metus*) or there was fraud (*dolus*), the Roman view was that there was a consent, but equitable relief was given. Over a wide field (*bonae fidei* transactions), as this relief was given as of course to one against whom it was sought to enforce the transaction, the effect was commonly much the same as if the transaction was absolutely void, at least where none but the actual parties to the transaction were concerned. Mistake is on a different footing. In general it was immaterial: if a man made an agreement under a mistake he was bound by it. There is no reason why his mistake should prejudice the other party. But there were some cases, which we shall consider later, in which the mistake was so fundamental that it was regarded as excluding consent altogether, and the transaction affected by it was void.

Since a transaction which is void will nevertheless take effect unless the party bound, *prima facie*, by it, raises the question, there does not seem to be much difference between a dealing which is void and one which is voidable, i.e., capable of being set aside. But there is a fundamental difference. The former was never valid: the latter is valid till it is set aside. If a form of transfer

of property is gone through under such a mistake as renders it void, nothing passes, and if the transferee purports to transfer to a third party, this third party does not acquire property. But where there was fraud in connexion with the first transfer but it had not induced such "mistake" as rendered the transaction void, property passed, and the second transferee, not concerned in the fraud, acquired a good title: the injured person's remedy was only against the first (fraudulent) transferee. It should be added that, in Roman Law, transactions which are voidable break into two classes. In one class, e.g., where a transaction is tainted by fraud, the defect may be proved whenever it is sought to enforce the transaction, without any previous procedure. In the other class, if exception is to be taken to the transaction, this must be done by raising the point in an independent procedure. Thus where a will is voidable because, though satisfying all rules of form, it unjustly excludes persons whom the law regards as having a claim, the point must be raised by a special procedure to have the will set aside—the *querela inofficiosi testamenti*, and here, rules were laid down prescribing to what extent rights which third persons had already acquired under the transaction were to be nullified or recognised. The various cases in which decrees of *restitutio in integrum* can be obtained are based on the same notion.

A transaction is not always a simple transfer, a simple undertaking or mutual undertakings: it may be complicated by what are called Modalities. Its operation may be suspended to a future day (*dies*), which may be either a fixed date or one certain to arrive, but at an unknown time (*certus an, incertus quando*), e.g., "*cum X morietur*." Its operation may be made subject to a condition (*condicio*), i.e., some event both uncertain and future (*incertus an*), e.g., "*si S. meus erit cum moriar*." The formal ritual transactions of early law admitted of neither of these. It is indeed laid down that no formal civil law act (*actus legitimus*) admitted of them, but, in fact, in nearly all private transactions, except those directly framed in the ritual forms of *mancipatio* or *cessio in iure*, both *dies* and *condicio* are allowed in classical and later law. And these ritual forms had practically disappeared under Justinian. There were indeed doubts in the classical law as to the possibility of conditions in some contracts, few but important, which were binding by mere consent (sale, hire and partnership), the notion apparently being

that consent dependent on a condition was not as yet a real consent at all and bound no one. These doubts had disappeared under Justinian. *Dies* and *condicio* differed greatly in their effects on the transaction, but this is a matter which must be considered in dealing with the law itself.

As a condition is a clause in the bargain, it may itself be open to exception, as the transaction may be, on the ground of impossibility, or illegality, and this may react on the transaction itself. In general, in transactions *inter vivos*, an impossible or illegal condition avoided the bargain; but, in wills, for reasons which will be more conveniently considered when these are under discussion, the offending conditions were themselves struck out, the provision remaining valid without them.

A modality sometimes confused with condition is what is called *Modus*. If property is transferred, it is possible to accompany the transfer by a direction as to the disposal of the property. There might of course be a condition to the same purpose, but a direction is not a condition. The transfer is in no way suspended. But the nature and history of the remedies for failure to obey the direction cannot here be considered.

The typical transaction is one in which the parties are dealing directly with each other. But we are now-a-days familiar with the notion of dealings by agent—the principle of Representation—under which the transaction gone through by the representative takes effect wholly in the principal, the intermediary being no more than a channel through which the effects pass. It is hardly possible to conceive modern life without this principle, but in Rome it scarcely existed. In litigation indeed it is found as early as the Republic, and in a form which is exceptional in modern law. With representatives to conduct the business of a litigation for us we are familiar: it is the duty of the barrister and solicitor. Advocates also existed at Rome, but the representation now in question is of a different kind. The agent (*cognitor*, *procurator*) became the actual party to the suit, and, in some cases in the Republic, and in nearly all cases under Justinian, the judgment, though given for or against the representative, took effect directly on the principal. In relation to transfer of property, representation did not appear till the second century of our era, and never applied to any but informal transfers. In contract, where it would seem to

be most necessary, it was never more than imperfectly admitted. The reason for its non-appearance here and its late appearance in transfer of property seems to be the fact that it was less necessary than with us, since all acquisitions of property or rights arising from contract or the like, by the son or a slave, vested, *ipso iure*, in the *paterfamilias*. This rested not on any theory of representation, for they so vested even though the acquisition had been forbidden, but on the much cruder principle that, these people being thought of as his, their acquisitions were also his. Such persons could alienate, if authorised, and here there is representation, but it is eked out by the notion of unity of the *familia*. The rule that their contracts did not bind the *paterfamilias*, unjust on the face of it in view of the fact just stated, that he acquired through them, was nevertheless that of civil law. The Praetor, indeed, remedied the matter by making the *paterfamilias* liable on the contracts to an extent varying with the circumstances, and he even gave a similar protection in some cases, where the contract was made by an employee not within the *familia*. It is, however, a mistake to see in this any recognition of the principle of representation: the underlying idea is different. The man for whose benefit and by whose action the enterprise is set going ought to take the risks of it, not necessarily absolutely, but within limits indicated by the circumstances and prescribed accordingly in the Praetor's Edict.

The fact that supervening impossibility (*casus*) commonly released from obligation, except where it was for some reason imputable to the party, might suggest a principle that there was no liability without fault. But there was no such principle. A man who had bound himself to pay a sum of money was liable to *condemnatio* if he did not do it, though he was unable to find the funds—impossibility means impossibility to anybody, not relative impossibility. There could be no impossibility in such a case and the most strenuous efforts to find the money would provide no defence. An *obligatio* to deliver specific goods was not quite on the same footing, for here there might be real impossibility: the things might cease to exist. Under Justinian, and perhaps in classical law, a buyer of specific goods under a simple contract had to pay the price, even though the goods perished by accident before the ownership passed (for in Roman Law the contract of sale of goods did not transfer ownership), and this is in effect a

liability without fault. In general, indeed, in these mutual undertakings, commonly called *bonae fidei* contracts, there was a closer approximation to the above-mentioned principle. A party was usually not liable except for wilful failure (*dolus*) or, in some cases, negligence (*culpa*). But in some of these cases he was bound to the safeguarding of the subject matter (*custodia*) and was liable if his precautions failed, however elaborate they had been. And the liability of the *paterfamilias*, on contracts by his subordinate, did not in the least depend on any fault of his own. He was responsible, within the limits prescribed in the Edict, for the acts of his subordinate as if they had been his own. But it is, perhaps, not in the region of contract that one would expect to find such a principle. There is nothing out of the way in holding a man to his bargain. If he chooses he can always guard himself by terms in the contract itself. It is in the region of civil injury (delict, tort), that we should more readily expect such a principle, and, in fact, the recognised actionable wrongs did involve either *dolus* or *culpa*. But here too there are many rules inconsistent with such a principle. The most obvious case is the liability of a *paterfamilias* for wrongs done by his subordinate, a liability usually falling short of full responsibility, but recognised by both civil and praetorian law. There were other cases. The occupier of premises was liable for certain acts originating therein no matter by whom they were actually done. A man who kept dangerous animals near the road kept them at his risk, and, however careful he may have been, was liable if they escaped and did damage. A man who by artificial works accumulated water on his land was liable if it escaped to the damage of his neighbour. Such rules as this, found as they are in many systems, may be explained in many ways. But it seems enough to say that where a man, e.g., by building a reservoir or assembling dangerous beasts, creates on his land a state of things which is quite likely, whatever his care, to result in serious damage to his neighbours, it is not unreasonable that it should be at his own risk.

In this connexion it may be worth while to point out that the problems of the practising lawyer are not the same as those of the student. The lawyer has constantly to face a difficulty that the student hardly ever meets, i.e., the establishing of the actual facts in the case. The difficulty does not appear on the face of the "Law Reports." It is only partially represented in the actual hearing of

the case, for though conflicting evidence and doubtful witnesses are common enough, there has usually been a vast amount of sifting of such matters before the hearing is reached, and the evidence which cannot be got may often be more important than that which is produced.

A scheme of rules as to rights and duties is not automatic: it does not enforce itself. If it did, or if everyone always fulfilled his legal obligations, there would be no need of a system of remedies. It is no doubt true that in most cases the remedies are not directly needed: people do in fact obey the law and the system of remedies is, in modern life, rather in the background. But the existence of these remedies is essential to the working of the social system as men are now constituted: we may hope, indeed, that we are progressing towards a time when the element of compulsion in law will not be indispensable, but we have not reached it. In the Roman Law throughout its history, the law was most commonly expressed in terms of the remedies: it was not said that a man had such and such a right, or was under such and such a duty, but that he had, or was liable to, such and such an action. Our own law was usually so stated till comparatively modern times.

If a man desires to enforce his rights he must himself set the machinery in motion. In primitive times the remedy was self help in which the State (so far as there was such a thing) took little or no part, the first step towards what can be called litigation being taken when self help had to be effected under the regulation and supervision of the public authorities. But when real history begins, we find, in Rome, a system in operation which has progressed beyond this. The dispute itself, the question whether the right claimed really exists, is submitted to tribunals organised under the control of the State. The forms of this litigation varied with the nature of the right which it was sought to enforce, and of course underwent great historical changes. These matters will be considered in their place: here it is enough to say that, as might be expected, the early forms had an elaborate ritual; that throughout the law it was for the claimant to set things going, and that to the end of the classical period the principle that litigation is in essence a reference by consent of the parties to a chosen arbitrator is maintained, in the rule that there can be no litigation, no reference to the courts, except by consent and with the co-operation of both

parties. In the classical law indeed, the principle, though formally maintained, was practically evaded by methods designed by the Praetor. In Justinian's law it had disappeared, but there were still rules of procedure which owed their existence to the fact that in the most formative period of the law, litigation had been thought of as resulting from agreement.

Enforcement is only a rough description of what the court ordinarily does. In many cases all that can possibly be done is to give money compensation, to order a payment which shall put the plaintiff in the same financial position as if the duty had been fulfilled or the wrong not committed. A horse cannot be revived, if it has been wrongfully killed. A promise cannot be actually enforced against one who has put it out of his power to perform it. In Roman classical law, indeed, though, in certain actions, e.g., claims of property, there was machinery by which the court could put pressure on a defendant to restore, there was in general no attempt to do more than compensate or order payment of damages, even where actual enforcement might have been possible. *Condemnatio* was always for money. Under Justinian, actual enforcement was possible in a wider field, but, even then, "damages" were still, in most actions *in personam*, the usual result.

When judgment has been given in favour of the plaintiff, it does not follow that the State will help him to get his money. Here too the initiative, in Rome, was with him. Up to the end of the classical period a further proceeding before the magistrate was needed before steps could be taken in execution of the judgment. After this proceeding, he might seize the debtor or his property (possibly both); the debtor, where his property was seized, becoming a bankrupt unless he voluntarily satisfied the judgment. In the later Empire, however, the further proceeding before the magistrate was not needed. Public officials would seize and hand over the thing, where this was ordered by the judgment, or, where this was not possible or appropriate, would seize enough goods to satisfy the judgment and sell them. Though seizure of the whole estate, sale and bankruptcy, was still possible in some cases, it was no longer the necessary result of an unsatisfied judgment.

CHAPTER I

SOURCES OF LAW

1. A primitive people has little need for legislation and little consciousness that express legislation is possible. Its daily life is governed by customary rules, very enduring, but vaguely conceived, and therefore undergoing a gradual but constant process of change. In such a community, much as in a modern college, a custom which has outlived a generation is thought of as ancestral. Roman tradition tells us of legislation by the more or less mythical kings, and there are references to a collection of these *leges regiae* made by a *pontifex* named Papirius shortly after the expulsion of the kings, the work having been the subject of a commentary by Granius Flaccus in the last century of the Republic. The citations which we possess from these *leges regiae* are all connected with religious observances and punishments. They were doubtless declarations of custom, rather than legislation, though, in such declarations by the civil and religious head of the State, there would inevitably be much that was in fact legislation. But the *leges regiae* end with the expulsion of the Tarquins and the establishment of a Republic in 510 B.C. (the *regifugium*) and they play but a small part in the later story of the Roman Law.

The expulsion of the Tarquins, mainly the result of a reaction of the ancient aristocracy, the patricians, against tyranny, was not an unmixed gain to the plebeians. The administrative chiefs were now two Consuls appointed to serve for a year with large, though not unlimited, powers. They were patricians, and the plebeians had lost the protection of the *Rex* who was, traditionally, their patron. This state of things led ultimately to the earliest real act of legislation concerning private law of which we know anything, the enactment of the XII Tables. By a revolt or secession, soon after the *regifugium*, the plebeians secured the appointment of Tribunes of the *plebs*, plebeian officers, with a power of veto over any act of a magistrate, affecting plebeians. Additions were made to their functions in later years, but more important than these was the fact that they adopted the practice of summoning assemblies

of the plebeians, out of which assemblies ultimately grew the most important legislative body of the later Republic—the Tribal assembly, of which we shall find two forms. But the uncertain and unwritten law, administered by patrician magistrates and preserved, as to some of its most practically important parts, as a patrician secret, seems to have been used as an engine of oppression, and the plebeians resented the fact that the reforms credited by tradition to Servius Tullius, to whom was attributed the incorporation of the plebeians into the civil community, had in fact given them the burdens of citizenship without its advantages. A demand arose for limitation of the consular power and for written laws. After ten years of struggle a Tribune, Terentilius Arsa, secured the appointment of ten men (*decemviri*) who were to supersede all existing magistrates, to administer the State, and to set out the laws in writing. They issued ten Tables of the Law, which were confirmed by the *Comitia Centuriata*, and, at the end of their year of office were succeeded by another ten, of whom some may have been plebeians. They issued two more Tables, but do not seem to have themselves submitted them to the *Comitia*. Tradition charges them with maladministration and refusal to give up office. They were deposed and the old magistracies restored, one result of this being that the Tribune of the *plebs* whose anomalous powers the written law had been intended to replace, remained a permanent element in the administrative system. The two further Tables were voted by the *Comitia*, and the XII Tables, mainly Latin custom with a certain infusion of Greek law, became, and long remained, the basis of the law.

Apart from the Senate, a select body to whose activities we shall recur, the public assemblies of the Republic with voting powers were:

(a) The *Comitia Curiata*. This body, presided over by the Consul, consisted of the *patresfamilias*, the heads of Roman households, grouped for this purpose in 30 *curiae*, each of which voted as a unit. Each *curia* consisted of a number of *gentes* or clans, the members of which bore a common name, the *nomen*, and were supposed to be connected by blood. A *gens* would include a number of families, of each of which the surviving male ancestor was the head, the *paterfamilias*, and, as such, a member of the *Comitia*. At first confined to patricians, it included the plebeian

patresfamilias apparently from early in the Republic. It had important functions. Its final vote was needed to confer *imperium* on the elected magistrates and, summoned in a different way and presided over by the *Pontifex Maximus*, it confirmed wills and Adrogations, i.e. adoptions of one *paterfamilias* by another. It does not seem that it ever enacted *leges* and it fell early into decay, its formal functions being carried out for some centuries by 30 lictors, who purported to represent it.

(b) The *Comitia Centuriata*. This was an assembly of all adult male *cives*, patrician or plebeian. The voting unit was the *centuria*, primarily a military division: the *comitia* is indeed only another aspect of the military organisation attributed by tradition to Servius Tullius. For military purposes the people were arranged in classes according to wealth, subordinate members of a family, who could own no property, being classed according to the wealth of the *paterfamilias*. In the system, as historically known, there was at the head an aristocratic class of *Equites*. Below these were five classes of *Pedites*, the first class consisting of the wealthiest, the fifth of persons of small means. Those whose wealth was below a certain minimum were excluded from the scheme and were not subject to military service, except in emergency. Each class provided a certain number of contingents, called *centuriae*, the numbers differing in the different classes, the *centuriae* within each class being arranged in two groups, equal in number, of *Seniores* and *Iuniores*, those above and those below a certain age. The heaviest armament and military duties and the highest number of *centuriae* were assigned to the highest classes, the *Equites* (18) and the first class of *Pedites* (80) having between them more than half of the total number of *centuriae* (192). It is to be noted, as a matter of nomenclature, that the five classes are not the original scheme. At first only the highest class of *Pedites* was called a class, its members being *classici*, the lower groups, though arranged as stated, not being called classes, but said to be *infra classem*.

The *C. Centuriata* was this body grouped for voting purposes, with the modification that all the very poor, below the classification, were grouped as one century for voting purposes. This assembly, the most important of the *Comitia* (*Comitia maxima*) had many functions, of which those which concern us are the election of magistrates, on whom *imperium* would be subsequently conferred

by the *C. Curiata*, and legislation. Much legislation in the earlier part of the Republic is due to the *C. Centuriata*, but it was an unsatisfactory body from the point of view of the plebeians since the voting strength was with the wealthier classes, in which they were little represented; and they maintained a steady pressure under which legislation gradually passed to the Tribal assembly. Soon after 240 B.C. the organisation of the *C. Centuriata* was altered in a way of which the details are uncertain but so as to incorporate in it in some degree the method of the tribal system now to be considered. Thereafter there were only 70 centuries in the *prima classis*, of which two were taken from each *tribus*.

(c) The *Comitia Tributa*. This was an assembly of the people grouped by *tribus*. A *tribus* was a local division, a region or district, a grouping devised for fiscal and administrative purposes and also assigned by tradition to Servius Tullius. There were originally only four, later called the Urban Tribes, but, as the territory of the State increased, rural tribes were added from time to time, till in 240 B.C. there were 35 in all. There was no further increase. The unit of voting was the *tribus*. It is to be noted that these Servian Tribes have no relation to the three tribes, *Ramnes*, *Luceres* and *Tities* or *Titienses*, of which the population of primitive Rome is traditionally constituted.

How and when the *C. Tributa* acquired the power of legislation is not clear. Three enactments are recorded, the *l. Valeria Horatia* (449 B.C.), the *l. Publilia Philonis* (339 B.C.) and the *l. Hortensia* (287 B.C.), all of which are said to have provided, with slight differences of wording, that what the *plebs* enacted should bind all *Quirites*, i.e. all *cives*. But, in terms, this does not apply to the *C. Tributa*, which included patricians and plebeians, but to another body consisting wholly of plebeians, the *Consilia Plebis Tributa*. It is probable that the tradition is faulty, and that the earlier of these *leges* did not deal with that body, or, at least, not exclusively, and did not give it free legislative power, but it seems clear that from 287 B.C., the date of the *l. Hortensia*, the purely plebeian assembly had legislative power. It is not always easy to distinguish in the recorded traditions between these two tribal assemblies, but, on the whole it appears that most of the later legislation was by the *Consilia Plebis Tributa*, its enactments being in strictness *plebiscita*, though the name *lex* is freely given to them.

2. The assemblies had not a free hand in legislation. Apart from religious and other ceremonial, which affected them in different degrees, they were restricted in that they could consider only propositions submitted to the vote by the presiding official, who also summoned them. For the *C. Centuriata* this was usually a Consul, for the *C. Tributa* usually a Praetor, and for the *Consilia Plebis Tributa*, a Tribune of the *plebs*. There was no question of amendments or even of discussion: any discussion had taken place before, often indeed immediately before, the assembly arranged itself for voting purposes. Further, it was usual, though it is not clear that there was any legal obligation in the case of *Comitia*, to submit all projects of legislation for preliminary approval by the Senate, and in the case of the *Consilia Plebis* this submission was legally necessary, to make the enactment binding on any but plebeians, till the *l. Hortensia*, above mentioned, abolished the necessity. There was yet a further requirement. All *leges*, in the strict sense, needed final approval (*auctoritas patrum*) originally of the Senate, but in historic times, after the plebeians had gained admission to the Senate, of the patrician element in the Senate. This requirement tended to diminish in importance, and, by the *l. Publilia Philonis* (339 B.C.) it was enacted that, at least for the *C. Centuriata*, *auctoritas* should be given before the vote. Little is heard of it afterwards and indeed it practically passed out of existence when the *Consilia Plebis* took over the work of legislation, for to *plebiscita* it had never applied.

Many *leges* were enacted during the existence of the assemblies, but, the XII Tables apart, they were never a main source of private law. We shall indeed meet with a considerable number in the various branches of our subject, but in the earlier half of the Republic nearly all the *leges* are concerned with political or constitutional matters, and later on, though they begin to cover a wider field, the majority are concerned with such matters or with criminal law. But the change in the character of the Roman State had, long before the fall of the Republic, taken all reality out of the popular assemblies. The territory of the State and the number of citizens steadily increased, and the assemblies, no longer really representing the Roman people, consisted in fact of the lower classes of Rome itself. Ignorant and corrupt, they were no more than the mouthpiece of the successful politician of the moment.

Nevertheless there was active legislation amid the disorders of the last years of the Republic. For a few years indeed, after the murder of Julius Caesar (44 B.C.), supreme control, including power of legislation, was vested in three men, the Triumvirate; and when, in 27 B.C., Augustus assumed control of the State, he was strong enough to have kept in his own hands the same powers. But avowed autocracy had already failed so often that it gave no promise of stability, and Augustus adopted a more subtle policy. He preferred to appear not as a despot but as president of a Republic. While retaining in his own hands all real power, he recognised the reverence which still existed for the old republican institutions, and he preserved these as affording a more indirect way of enforcing his own will. Thus he restored to the assemblies the power of legislation and the appointment of magistrates. But he retained the right to object to particular candidates and even to recommend candidates for election, a recommendation equivalent to a command. Moreover, he held for life the powers of a Tribune (*tribunicia potestas*) without the actual office, and the legislation of this age was by the plebeian assembly. He usually presided, either in person or by representative, and thus nothing could be proposed without his approval. Thus the only real power of the assembly was that of rejection, and in fact they did reject, and delay for many years, the completion by the *l. Papia Poppaea* (A.D. 9) of the elaborate legislation for the encouragement of marriage, the first part of which was the *l. Iulia de maritandis ordinibus* of 18 B.C. After the death of Augustus, in A.D. 14, there are few *leges*: the last of which any trace exists was under Nerva (A.D. 96-98).

3. *EDICTA MAGISTRATUUM*. Among the attributes of the higher republican magistrates was the right of issuing Edicts—*ius edicendi*. These Edicts were not thought of at first, or as used by the Consul, as a mode of legislation, but rather as a means of giving information and of stating administrative rules within the law. In 367 B.C., after a long agitation, it was provided by one of the *leges Liciniae* that, for the future, one of the Consuls should be a plebeian, and at the same time it seems also to have been provided that a new patrician magistrate should be created, to whom the name *Praetor*, the original official style of the magistrate whom we know as the Consul, was assigned. To him was transferred from the Consul

the duty of presiding over litigation, that is to say, not of trying cases (the actual hearing was, as we shall see, before other persons) but of presiding over the preliminary proceedings—*ius iuris dicendi*, *iurisdictio*. As partiality in the administration of justice was one of the chief grievances of the plebeians, this was to lessen greatly the value of the concession made, and the Praetorship, also, was soon thrown open to plebeians.

The Praetor, like the other magistrates, had the *ius edicendi*, and no doubt at first he merely issued Edicts in the same way. At some early date, it became the practice of the new Praetor, at the beginning of his year of office to issue an Edict in which he set forth the principal rules which he proposed to follow in the exercise of *iurisdictio*. This was the *Edictum Perpetuum*, so called because it stood for the whole year, to distinguish it from what may be called emergency edicts for particular occasions to which the name *E. Repentina* is sometimes, unofficially, given. The *Edictum Perpetuum* did not at first differ from the other edicts: it was not a means of law reform. But in the last century of the Republic it was by far the most important source of new law. How and when this began is uncertain, but it is fairly clear that it either began or was enormously stimulated by the passing of the *l. Aebutia*, in the middle of the second century B.C. This statute seems to have authorised the Praetor to allow the parties, in the preliminary stage of litigation, in which the issue between them was defined, to substitute, for the rigid system of the *legis actio*, the much more elastic *formula*. In the *legis actio* this preliminary stage consisted in the recital, by the parties and the magistrate, of certain ritual forms of words elaborated for each kind of claim by the *Pontifices*, such importance being attached to the ritual that any error in the words used involved loss of the action or invalidity of the proceedings. In the Formulary system the statement of the case was settled between the parties, under the supervision of the Praetor, and with the help of models set out in the Edict, so as to define as exactly as possible the issue which the *iudex* was to try. The provision of these *formulae* and the other directions necessary to the working of the new method greatly increased the importance of the Edict. But the change was much greater than this. Either under some provision of the *l. Aebutia*, or, more probably with only the tacit approval of the

people, for whose growing needs the ancient crude and formalistic law was becoming inadequate, the successive Praetors gradually modified the law in almost every branch. They refused actions where the civil law had given them (*denegatio actionis*), extended existing actions to analogous cases (*actiones utiles*), gave wholly new actions (*actiones in factum*) where the civil law gave none, admitted defences not allowed by earlier law and set aside transactions valid by that law. It is to be observed that, throughout, the Praetors do not purport directly to change the law of rights and duties: they speak almost entirely in terms of procedure. They do not give or take away a *right*: they give or refuse an *action*. They do not declare a transaction void, they refuse to enforce it—*ratum non habeo*. In the result the most sweeping changes were produced, and doubtless the indirect method eased the way of the reforming Praetors.

This mode of legislation had one great advantage: it was experimental. As no Praetor's Edict was binding on his successor, a new rule which had not worked satisfactorily could be dropped or changed as required. In practice there would not ordinarily be great changes from year to year. The new Praetor might add a clause or two, such additions being called *Edicta nova*, but the greater part would be adopted from the old Edict—*Edictum praelatum*—and much was traditional, and went on from year to year—*Edictum tralatitium*.

The Praetor was not necessarily a lawyer, and in reform, as in routine administration, he was advised by qualified men. From his and their observation of the difficulties which arose in practice under the existing law, the *disputatio fori*, there would be many suggestions: it is evident that many of his changes were merely the giving of legal sanctions to practices and understandings which were relied on by men in their ordinary dealings, though they were not as yet legally enforceable. But there was another important factor. The great influx of foreigners into Rome led to the appointment in 241 B.C. of a second Praetor to take charge of litigation in which foreigners were concerned—" *praetor qui inter peregrinos ius dicit*," *praetor peregrinus*, the original Praetor being now called *praetor urbanus*. The Peregrine Praetor issued a similar Edict, but the strict civil law not being available to peregrines, some of the content of the Urban Edict would not be applicable, and

its matter was therefore somewhat different. Much of its content was what came to be called the *ius gentium*, the source of which has been variously explained. The most widely held opinions are that it was merely the simpler part of the Roman Law, that part of it not bound up with typically Roman notions, and that it was in fact the simple rules observed in their intercourse by the trading peoples of central Italy. It does not seem that there is really much difference between these. How far the Urban Praetor took over any absolutely new ideas from the Peregrine Edict is uncertain, but, in any case, the existence in the community of a body of persons whose dealings were conducted without formalities must have had a considerable effect, by forcing the conclusion that formless transactions might well be given legal efficacy over a wider field, and that the mere fact that elaborate ceremonies had been gone through did not of itself shew that the transaction was one which the law ought to enforce.

There were other Edicts not without importance in the private law. Among the functions of the Curule Ediles was control of markets and in exercise of this function they issued Edicts of great importance in the law of sale; and the establishment of *provinciae*, territories outside Italy (of which the ordinary inhabitants were not *cives Romani*), the earliest being Sicily (240 B.C.), brought fresh Edicts. The Edicts published by the Provincial Governors followed in the main the Roman Edicts, but there were local variations, especially, but not exclusively, in civil procedure. These Edicts do not directly affect Roman Law, but there is reason to think they were the source of some reforms.

It is clear that all Praetors did not adhere consistently to the rules announced in their Edict: unfair departure from them became in fact a popular grievance. A remedy was sought in a *l. Cornelia* (67 B.C.), a plebiscite which enacted "*ut praetores ex edictis suis perpetuis ius dicerent*."

The Praetor continued to be the chief agent of law reform throughout the Republic and his activity continued, though on a lesser scale and overshadowed by the power of the Emperor, till after the first century of the Christian era. The end came when Hadrian, about A.D. 125, instructed Salvius Iulianus, the greatest jurist of the time, to put the Edicts into permanent form. Julian dealt with all the Edicts. In the Urban Edict, the most important,

he does not seem to have made many great changes. He added at least one rule and he distributed the different *formulae* for actions under the clauses or Edicts with which they were connected. In the earlier Edicts they had been in an appendix. Each separate provision was called an *edictum*: it was indeed in such individual edicts that the collective *Edictum Perpetuum* originated. As finally settled by him the Edict was confirmed by *senatus consult*, and it was provided that any further changes in the law were to be made by imperial authority. The Edict was still issued, but it was binding, as it stood, on the Praetors: they could make no change in it. It had the same permanency as a statute; and the most important part of the writings of the jurists as preserved in the lawbooks of Justinian consists in the commentaries on the Edict of Julian. But the law originally created by the magistrates, by Edict, the *ius honorarium* (so called as made by those who held *honores*), still continued as a distinct body of rules, side by side with the *ius civile*, having its own methods and remedies. It was not till the sixth century that the two systems were practically fused.

4. *SENATUS CONSULTA*. The Senate, originally an advisory council of the *Rex*, nominated by him and purely patrician, appears in its earliest really historical form as including both patricians and plebeians, nominated ordinarily by the Consuls. Till the last half century of the Republic it had 300 members, but Sulla, in 88 B.C., increased it to 600. Julius Caesar enlarged it still more and is said to have admitted persons of the lower orders, hitherto excluded from it. On the founding of the Empire, Augustus, in conformity with his policy of respecting the ancient republican institutions, reverted to the number 600 and to something like the old qualification.

The Senate continued in the Republic to act as advisory council to the magistrates, with, apparently, a steadily increasing control of them, a development much helped by an enactment of about 315 B.C., the *l. Ovinia*, a plebiscite which transferred the choice of Senators to the Censors and provided also that vacancies were to be filled from ex-magistrates, with a power of exclusion for sufficient reason. The effect was greatly to increase the weight of the Senate as against the magistrates, and, in fact, the Senate began to give instructions rather than advice. But it had no

legislative power, and though it issued *senatus consulta* containing instructions to the magistrates, which look very like legislation, these were thought of as administrative orders for enforcement of the existing law. But though the Senate did not legislate, it had many means of influencing legislation. As we have seen it was usual to consult that body on projects of legislation. It could declare a law void for informality or disregard of the auspices. It could in effect dispense from, or suspend, a law by directing magistrates not to apply it in a given case or for a certain time; and though this at first required confirmation by the *Comitia*, this rule was freely disregarded from 150 B.C. onwards. An attempt to abolish the power led simply to a *lex Cornelia* (67 B.C.) which required a vote of 200 Senators and subsequent confirmation. These activities, together with the administrative orders which it issued, and the plain fact that it was the only body which retained any stability, paved the way for the legislative power which it gained early in the imperial period.

It was part of the policy of Augustus to foster the Senate. But here, as elsewhere, he saw to it that real power was with him. As *Princeps Senatus* he could preside and thus determine what questions should be considered. The Censors filled vacancies, but the Emperor was sometimes Censor and in any case practically nominated the Censors. There was an annual revision of the list of Senators and the Emperor could strike off members to whom he objected. Under Domitian (A.D. 81-96) the powers of the Censor were transferred to the Emperor, so that he always nominated. It is not surprising that, without, so far as appears, any express authorisation, the Senate soon began to legislate. This usurpation of power, encouraged by the Emperor, began in an extension of the old instructions to magistrates. The earlier *scc.*, though clearly introducing new rules, are, in form, directions to magistrates to insert these rules in their Edicts, directions which they dare not disobey, for behind the Senate was the Emperor. All important *scc.* were introduced by him. So far as is known the earliest *sc.* which directly purports itself to alter the law is the *sc. Tertullianum*, under Hadrian. But before that time it had become the practice to submit to the Senate a draft settled by a committee, so that the Senate merely voted. The proposal commonly took the form of a written *Oratio Principis*, on which the

Senate were requested to decide, a request gradually and insensibly transformed into a direction to vote it. The vote becomes a mere form and before the end of the second century lawyers habitually speak of the *oratio* as the legislative act: the formal vote is of little importance. The latest recorded *sc.* is one under Probus (A.D. 276–282) and the form and language of the allusion shew that the Senate is regarded as having nothing more to do with the matter than to record the decision of the Emperor.

5. *PRINCIPUM PLACITA*. Augustus, as we have seen, did not claim the power of legislation: he preferred the indirect but equally effective method of which his dealings with the assemblies and the Senate have given us illustrations. He did not desire the fate of his uncle. But when the imperial power was sufficiently consolidated the mask was thrown off. Early in the second century Hadrian definitely claimed the legislative authority which in fact he and his immediate predecessors had already been exercising. Of possible rivals we have seen that he muzzled the Praetor and that the action of the Senate was mere form. In the third century *sc.* ceased, and the Emperor was the sole legislator. In that century it was admitted that he was above the law. The veiled autocracy became an avowed one, and the so-called Dyarchy, in which supremacy was shared between the Emperor, as such, and the Senate (in fact the Emperor as *Princeps Senatus*) became a Monarchy.

Apart from *Mandata*, administrative orders to high officials, binding only within their jurisdictions, and rarely of importance in general law, the chief forms of imperial legislation (*constitutiones, placita*), at least till the Byzantine age, were *Edicta, Rescripta* and *Decreta*.

Edicta Principis, like the older Edicts, were valid only within the area in which the Emperor had authority and for the duration of his office. But as his authority extended over the whole Empire and was life-long, this meant only that his Edicts failed at his death. Even this limitation was disregarded when the Emperor was sole legislator: his Edict had the same stability as a statute. Indeed it is not very clear that the limitation was ever practically applied: Edicts are found enforced after their author's death, and, though this may be due to renewal, it is also possible that the divinity and immortality decreed to dead Emperors involved a

similar perpetuity to their Edicts, unless repealed by a later Emperor.

Rescripts were replies to enquiries or petitions by officials or private persons. In the first case the reply was an *Epistola*, a separate document: in the other it was endorsed on the application—*subscriptio*. Such things were not primarily designed for legislative acts: it was only gradually and incidentally that some of them served this purpose, and they became important only after the suppression of reform through the Praetor's Edict. Some times the Rescript definitely stated that it was laying down a new rule for future cases; but often it did not, and it might be difficult to tell whether it was so intended or was a mere *privilegium* not meant for general application; or gave a wrong decision by mistake, the intent having been, as in most Rescripts, to apply the existing law. There was conflicting legislation in the later Empire as to the use of Rescripts in court, and Justinian finally decided that any Rescript or the like which did in terms state a new general rule was to be binding in future cases whether so declared or not.

Decreta were judicial decisions of the Emperor, either sitting in first instance in his capacity as a magistrate, or on appeal. They appear to be the only "case law" admitted in the Roman system. Such as are recorded seem usually on minor points and their importance is lessened by the fact that in post-classical times the Emperor's decisions are commonly given by Rescript. This is issued either on the *relatio* of the official concerned with the matter (in which case the Rescript either decides the point or states the law applicable and leaves it to the applicant to apply it to the facts he finds), or on *supplicatio* of a private suitor, the so-called Rescript Procedure, which would lead to a Rescript stating the law, and leaving the official concerned to determine the facts and apply it accordingly.

Rescripts are numerous in post-classical times, but they deal mainly with details, and in the Byzantine age most of the legislation is in more general form. The name Edict is not commonly used, perhaps on account of its republican sound, the so-called Edicts of Justinian being more like *mandata*. The general enactments are called *leges generales*, *leges edictales* and other names, the nomenclature being unimportant in an age when the Emperor can make what law he will and how he will.

The increasing importance of the Eastern Empire led Diocletian to divide the State into two sections, the East and the West, each under an Augustus, himself and Maximian, issuing laws jointly but administering independently their parts of the Empire. Under Constantine the Eastern Empire acquired an ascendancy, for he transferred the capital to Byzantium. The system of division was irregularly applied till A.D. 395, from which date it remained constant till the fall of the Western Empire in A.D. 475. An imperial enactment promulgated in one part of the Empire was at once in force in the other, till A.D. 439, when it was provided that legislation by the Emperor of one part should not be binding in the other till it was promulgated there also. But when Justinian drove the Ostrogoths out of Rome, he governed the whole as one undivided State.

6. *RESPONSA PRUDENTIUM*. In early Rome, as in all infant civilisations, law is hardly to be distinguished from religion: *Fas* is much the same as *Ius*. In such conditions priestly influence dominates the law, and in Rome, for two centuries after the founding of the Republic, the most powerful agency in the development of law was the *Collegium* of Pontiffs, a group of priestly officials. They were not priests in the sense that they administered the various cults but officials with a general duty of supervision over all religious observances of the State. It followed that they were the custodians of the law, and it was one of their duties to give advice to applicants. It fell to them to elaborate and to explain the complicated ritual of litigation, to formulate the precise wording in which claims and defences must be made, and, by ingenious methods of interpretation of which Gaius has preserved some instances, so to modify existing institutions as to make them suitable for ever-changing conditions. The resulting rules were treated as a professional secret, and this secrecy, coupled with the fact that the *Pontifices* were patricians, formed one of the grievances of the plebeians. The situation was somewhat eased when, about 305 B.C., Gnaeus Flavius, a scribe in the employ of Appius Claudius Caecus, published, probably with the connivance of Appius (it is sometimes suggested that he was the real author) a work later called the *ius Flavianum*, which contained, *inter alia*, the details of *legis actio*, i.e. of civil procedure. More important still was the change effected according to tradition by a *l. Ogulnia*, of 300 B.C.,

when it was provided that half the Pontiffs and Augurs should be plebeians; and the end of pontifical control and patrician advantage came when, a few years later, Tiberius Coruncanius, the first plebeian *Pontifex Maximus*, gave public advice and instruction on law, thus making accessible to every one what had hitherto been the secret of the privileged classes. The secularisation of the study of law which resulted gave rise to the class known as the *iurisprudentes*, laymen who studied the law and further elaborated what they had inherited from the Pontiffs, the *ius civile*. This expression, which we shall find used in more than one sense, is here used, in what seems to be its oldest meaning, to denote the unenacted, unwritten, part of the law, the "custom of the realm," developed in the traffic of everyday life, based to some extent on the scanty texts provided by the legislator, but really consisting in the creation of new rules to meet new needs.

The jurists of the Republic held, as such, no official position, but they acted as advisers, not only to the often unlearned magistrates but to private persons. This would naturally be on points of law, but Cicero tells us that in the old times before him they had been consulted on all questions of practical life. They received no fees, but attained great popular esteem, and prominence as a *iurisprudens* often opened the way to office in the State. With the limitation that their advisory function in civil life was narrowed to a purely legal field, this account remains true in the later Republic. Cicero describes the function of the jurist as consisting in (i) *respondere*, giving advice to private persons and officials; (ii) *agere*, guiding the conduct of litigation, not by acting as advocates, which was the task of the *oratores*, but by advising on the points of law and procedure involved; and (iii) *cavere*, directing the precautions to be taken in legal transactions, including no doubt what Cicero also calls *scribere*, i.e. the preparation of legal documents. It was also always recognised that one of the duties of a jurist was to give instruction, not by way of lectures to beginners, but by allowing younger men to be present at his consultations and discussing points with them as they arose. This seems to have been the most important part of the training of a lawyer, and it increased in importance early in the Empire. Thus grew a continuous tradition which has much to do with the excellence of the law. In addition to this there are early indications

of what became in some respects the most important juristic activity, the production of legal literature. The earliest known examples of this seem to be the *ius Flavianum* already mentioned, and a work traditionally attributed to the master of Flavius, Appius Claudius Caecus, "*de Usurpationibus*." A century later Sextus Aelius published a work called "*Tripertita*," and we hear also of a *ius Aelianum* and *commentarii* by the same writer, which may be the same or different works. Thereafter literary activity among the jurists became common, but all this early literary work was of an unsystematic character. The earliest works were little more than collections of forms for use in litigation and business transactions, and though literary production gradually takes a wider range, it is some time before we get anything but books in casuistic form, discussing individual cases, with no attempt at framing a general scheme of principle. Collections of *responsa* and commentaries on particular pieces of legislation appear in the seventh century of Rome, and about the middle of that century there are signs of a more theoretical view of law as based on assignable general principles. The first really systematic and scientific treatise on the law seems to have been the work of Quintus Mucius Scaevola, *Pontifex Maximus* (under whom Cicero studied), who wrote amongst other works a general treatise on the civil law. He is the earliest writer from whom the Digest of Justinian has extracts. A distinguished pupil of his was Aquilius Gallus, who added important institutions to the law, and is frequently cited by later writers, but we have no direct knowledge of his literary work. He in turn trained Servius Sulpicius Rufus, who is credited with many books and is said to have been the first of the jurists to apply conceptions derived from Greek philosophy to the analysis of legal notions. Among the jurists of the last years of the Republic were Alfenus and Ofilius, pupils of Servius, Cascellius, Trebatius, with others of less importance, and Antistius Labeo, who belongs rather to the age of Augustus. Labeo was a man of mark in political life, a republican and an opponent of Augustus, but he was also a great jurist, more frequently cited by later lawyers and in the Digest of Justinian than any other lawyer of his time.

There was a certain rivalry between Labeo and another jurist of the time, Ateius Capito, which is of interest since it was the beginning of two rival "schools" of thought in Roman Law, the

Proculian school, called after Proculus, a pupil of Nerva, who was a pupil of Labeo, and the Sabinian school, called after Masurius Sabinus, a pupil of Capito, and the most notable lawyer of his time. It has never been determined what, if any, was the basic difference of principle which divided the schools. Many differences are recorded, for the conflict seems to have continued till the middle of the second century, but they are not enlightening. Of the many views the most recent is that the Proculians (*Analogists*) sought to make the law more logical, while the Sabinians (*Anomalists*) rested on authority. It is difficult to harmonise this with what is known of Sabinus, and there are many other views. It seems clear that the differences do not reflect the personal characteristics of Labeo and Capito. Something turns on the sense in which the word *schola* (*secta* is also found) is used. The *scholae* seem to have been definite organisations with leaders, not merely as the most prominent members, but as heads, with a regular succession¹. Thus among the chiefs of the Sabinian school were Sabinus himself, Cassius (after whom the school is sometimes called Cassian), Javolenus and others of less weight, and finally, under Hadrian, Julianus, the *ordinator* of the Edict. Recorded chiefs of the Proculian school are Pegasus, Celsus, father and son, and Neratius. It has therefore been suggested that these were schools in a literal sense, like the Greek schools of Philosophy. There are known to have been such *stationes docendi* in Rome, and it may be that these were two famous *stationes* founded by Proculus and Sabinus, and the differences of doctrine may not express any fundamental difference of principle at all.

Little is heard of the schools, as existing institutions, after the time of Hadrian. The great lawyers of the next generation, Papinian, Ulpian, Paul are not described as of either school. But the differences of opinion are recorded, and though Labeo was a greater jurist than Capito, the Sabinian doctrines gained increasing ascendancy as time went on.

7. During the Republic the opinion of a *iurisprudens* had no official authority: any weight which it had depended on the reputation of the lawyer. Early in the Empire there came a change. Upon certain selected jurists was conferred a *ius respondendi*, but there is some obscurity about the history and the nature of this

¹ D. I. 2. 2. 50 sqq.

privilege. We are told that Augustus "*ut maior iuris auctoritas haberetur*" provided that certain jurists should give sealed *responsa*, under his authority, and again, that Hadrian provided that if those so privileged were all of one mind, their opinion should be binding on the *iudex* trying a case, but if they disagreed he was to be free to exercise his own judgment. These statements leave it doubtful whether Augustus made the *responsa* binding and Hadrian provided for a difficulty which must have presented itself, or Augustus merely gave certain jurists an honorific distinction, primarily intended to associate with his own authority the great influence exercised by these men, but, in fact, leading to *de facto* authority in the courts, while Hadrian turned this into definite legal authority. It is also uncertain whether these official *responsa* were binding in future cases or only for that in connexion with which they were actually given. On the whole it seems probable that the latter is the right solution, but such *responsa* would inevitably carry much weight if they were cited in later litigation.

Fortunately for legal historians these jurists were active in literary production: it is from what is left of their literary work, far more than from enacted laws, that we have learnt what we know of the law of the "classical" age. Their writings are of many kinds. There are works intended for instruction (*Institutiones*, *Regulae*, etc.), collections of *Responsa*, treatises on the whole law (*Digesta*) or on main divisions of it (*ad Edictum*, *ad Sabinum*), unsystematic discussions of special points (*Quaestiones*, *Disputationes*), and monographs on special statutes or branches of the law. Most of these are lost, but much is preserved in an altered form in the Digest of Justinian, and there survives a little of the literature untouched by him. Of these latter remains the most valuable is the *Institutiones* or *Commentarii* of Gaius (of which, until 1816, we had only a late and bad epitome), which served as the main basis of Justinian's own *Institutiones*. We have also the *Sententiae* of Paulus, part of Ulpian's *Regulae*, part of a practitioner's handbook, commonly called the Vatican Fragments, the *Collatio*, a comparison of certain branches of the Roman and the Mosaic Laws, with extracts from juristic writings, the *Consultatio*, answers of a late practitioner to questions put to him by a client, with similar extracts, and a number of minor fragments, to which discoveries are slowly adding. Unfortunately all these come to us from MSS.

of the fourth or later centuries, and have suffered the adulteration with later matter which is inevitable where MSS. are copies of copies of copies. Paul and Ulpian are abridged and contain matter not in the original text. Gaius is purer than these are, but even in Gaius there are many additions, usually due to incorporation in the text of glosses written in the margin by the owner of a MS. from which a later one was copied.

The prominence of jurists in public life was not lessened by the advent of the Empire. The Emperor commonly acted with the advice of a *Consilium*, at least from Hadrian onwards, and the leading jurists of the time were commonly members of this body. Probably all jurists so honoured had the *ius respondendi*, though, curiously enough, the fact is recorded of very few. They frequently held the Consulate, which however had become rather an honorific distinction than an office. But they also held high imperial offices. Papinian, Paul and Ulpian were all *Praefecti Praetorio*, the highest executive office under the Emperor.

It was in this period, of about two centuries from Augustus onward, that Roman juristic science reached its highest point. The "classical" age of Roman Law is commonly said to last from Julian, under Hadrian, to Ulpian, who was murdered under Caracalla, in A.D. 228, but the term has no technical significance, and the epithet may justly be applied, and sometimes is applied, to the whole period from Augustus to Caracalla. There was not a sudden uprising of a group of brilliant lawyers: there was a continuous development from the times of Quintus Mucius Scaevola and Servius Sulpicius Rufus. But if the growth was steady and continuous, a satisfaction of the needs created by growing wealth and trade, the collapse was dramatically sudden. The last great jurist was Modestinus, a younger contemporary of Ulpian, and even he is commonly held to stand on a lower level. A few later writers used by Justinian, one or two of a century later, have no pretension to rank as classics—the end of that race came about A.D. 250. The *ius respondendi* seems to have continued a little longer: there is a story of its conferment by Diocletian on one Innocentius, of whom nothing else is known. Many causes have been suggested for the sudden collapse. The increasing absolutism of the Emperor, the growing ascendancy of the Christian religion, with its complex theology attracting the abler minds, doubtless played their part, but there

was also, more important perhaps from this narrow point of view, the end of the *Pax Romana*, of orderly stable government of the known world. There came the age of disorder and corrupt administration. Roman civilisation was in decay: it is not in such an age that scientific study of law will prosper.

An obvious effect of the failure of the line of great jurists was an increasing importance of the writings they had left. But to those who administered the law, often unlearned, and, as time went on, more and more unlearned, this great mass of subtle argument and conflicting opinion became rather a burden than a help. It was hard to say what was authoritative and what was not. There was legislation under Constantine, authorising some works and excluding others, which seems to imply earlier legislation giving authority to some books. It is plain that this did not settle the matter; and it was not till A.D. 426 that some kind of solution was found by the enactment of the "Law of Citations"¹ (*de responsis prudentium*) by Theodosius and Valentinian. Under the provisions of this statute (i) all writings of Papinian, Paul, Ulpian, Modestinus and Gaius were confirmed and might be cited, Gaius to have the same authority as the others, (ii) any writer cited and approved by any of the five (Scaevola, Sabinus, Julian and Marcellus are named as examples) might himself be cited, provided comparison of MSS. shewed the citation to be accurate, and (iii) the *iudex* must adopt the view of the majority: in case of equality, Papinian must be followed, but if he was silent the *iudex* might form his own judgment. The insistence on the admissibility of Gaius shews that apart from this he would have been thought of as of lower authority—probably he never had the *ius respondendi*. It shews also in what high estimation he was held in the time of decline, for he is earlier than any other of the five. The *lex* is in some points obscure, and the provisions for the case of conflict are unscientific and mechanical: either the framers of the law were themselves inferior persons, or they had a low opinion of those who would be called on to administer it—probably both propositions are true. When, a century later, Justinian set about his codification of the juristic writings, he took, as we shall see, a more rational line.

8. THE AGE OF CODIFICATION. The imperial enactments, rapidly increasing in number, covering, at hazard, the whole range of law,

¹ C. Th. 1. 4. 3.

and, by reason of difficulties of communication and imperfect methods of promulgation, not always readily ascertainable, created a burden for the practitioner almost as great as that of the unmanageable juristic literature. Something was done to help him by two collections published privately about the end of the third century, the *Codex Gregorianus* and *Codex Hermogenianus*. These collections do not now exist: what is known of them is from citations in later literature, especially the barbarian codes which will be mentioned later. From these remains it appears that the Gregorian *Codex* was published about A.D. 300 and contained the imperial enactments from Hadrian to its date arranged in books and titles following closely the order which had been adopted by Julian in his comprehensive *Digesta*, an arrangement which differs somewhat from that of the Edict, and set the fashion for later works of a similar kind. Within the title the order was chronological. The *C. Hermogenianus* is from a little later, perhaps about twenty years, and is more or less supplementary to the Gregorian, though some laws are found in both. It is in titles, not grouped into *libri*. Although these collections were private work, they seem soon to have been accepted as authoritative, and they were the source from which later compilations derived the earlier imperial legislation.

About a century later came an official collection, the *Codex Theodosianus*. Theodosius the Great, besides founding or reorganising a Law School at Constantinople, seems to have designed a general scheme of codification of the law, but this collection of imperial enactments was the only part of it which was carried out. It was published in A.D. 438, and contained the imperial enactments from Constantine to its date—in effect a continuation of the above-mentioned collections. It seems to follow in general their order. It was to contain all the enactments, whether still in force or not, so that it would record the progress of change. As we have it, it is not complete; but parts exist in many manuscripts, the most important source being the *Breviarium Alaricianum*, shortly to be mentioned, which contains a great part of it. It is in sixteen books.

When, at the end of the fifth century, the Western Empire was overrun by the Barbarians, the conquerors found it necessary to provide a law for their Roman subjects, law being then thought of as attaching to a race rather than to a territory. They therefore had codes prepared for those of their subjects who “lived Roman law.”

Of these codes much the most important was the *lex Romana Visigothorum* (*Breviarium Alaricianum*) promulgated in A.D. 506 by Alaric II. Its importance for Roman Law is that it preserves a great part of the Theodosian Code, and contains abridgements of the *Institutiones* of Gaius and the *Sententiae* of Paul, with some other matters. A little later are the *Edictum Theoderici*, promulgated by Theoderic for the East Goths, and the *lex Romana Burgundiorum*. These are of less value as they do not purport to give the exact wording of their sources, which are much the same as of the Breviary.

The enactment of the *C. Theodosianus* did not of course suspend the progress of legislation. In the next century there was a considerable mass of imperial legislation, some of which we have in its original form, while much of it is known only through Justinian's Codification which we have now to consider. Justinian, besides reforming the Law Schools, and the system of legal education, embarked on, and completed, a great scheme of codification of the law—the *Corpus Iuris Civilis*. He cleared the ground by a series of enactments settling a number of doubts and differences of opinion in the existing books, and sweeping away many distinctions and institutions, some obsolete, though still cumbering legal literature, others still in practical application, but, in his view, of no practical value. These reforming enactments, or some of them, seem to have been collected in a work called the *Quinquaginta Decisiones*. It has not come down to us, but its content is no doubt embodied in the Codification which we possess. The first step in this was

(i) The *Codex*. This was a collection, promulgated in A.D. 529, of the imperial enactments, so far as still in force, the material being found in the Gregorian, Hermogenian and Theodosian Codes with later legislation. The editing committee, of whom Tribonian, his chief councillor (*magisteria dignitate inter agentes decoratus*), the main promoter and agent of the whole scheme, was president, were instructed to correct and modify wherever this was necessary in order to bring the matter up to date. They were to omit obsolete provisions and to divide *constitutiones* or fuse two or more together where this was necessary for convenient arrangement. This Code has not come down to us, as it was superseded by a new edition within a few years. The next step and the most important and difficult was

(ii) The Digest or Pandects. This was a codification of the juristic writings. The editorial committee, with Tribonian at the head, were directed to embody in a work of fifty *libri*, subdivided into *tituli*, and arranged in the main in the order of Julian's Edict, the writings of the jurists. They were to utilise any jurists who had at any time had any form of authorisation, and in fact they utilised some republican jurists who had been quoted by later writers and so might have been cited under the Law of Citations. They were directed not to pay attention to the exclusion of certain books, and not to choose any view merely because it had a majority in its favour, but in all cases to adopt what seemed the better view. They were to modify where this was necessary in consequence of later legislation, especially of course Justinian's own reforms, to eliminate redundancies and conflicts and not to repeat matter already in the *Codex*. In the book as it appeared, each extract from a jurist is headed by his name and a reference to its position in his works, a practice which has rendered much help in restoring the history of the law.

The order of books and titles is intelligible enough: it is in the main that of the Edict, modified here and there by that of the *Codex*. But the order of the extracts within the title is at first sight very confusing. The explanation offered by Bluhme, A.D. 1820, is generally accepted. To shorten the work, since there was a vast amount of literature to be dealt with (according to Justinian 2000 treatises were examined), it is suggested that the commissioners formed themselves into three sub-committees, each to deal with one class of books. One committee dealt with Ulpian, *ad Sabinum* (practically a general treatise on the civil law), and works dealing with the same topics—the Sabinian Mass, another with Ulpian, *ad Edictum*, so far as this handled the purely praetorian part of the Edict, and other works on the same topic—the Edictal Mass, and the third with the writings of Papinian, and others on the same matters—the Papinianian Mass. There is a small group of books not in any of these masses. It frequently appears at the end of a title, and commonly immediately after the Papinianian Mass. It is therefore called the Appendix or the post-Papinianian Mass, and is supposed to have consisted of books which had been overlooked, and handed to the Papinianian committee as having the smallest mass to deal with. When the committees had done their

work they met and put together their results, striking out repetitions and placing first in each of the pre-arranged titles that mass which, from bulk or other causes, was the most important in that subject. Thus the order in which the masses appear varies greatly in the different titles: it is indicated in the current editions of the Digest. Here and there the arrangement is modified: a passage from one mass being detached from the rest, the chief reason for this being the desire to give some introductory matter which the mass to be placed first does not supply, and to provide a convenient transition from one branch of the topic under discussion to another.

The Digest is much the most important authority for Justinian's law: it is also of great value for the classical law, since we have what purport to be the very words of the great jurists of the past. But as the compilers were directed to bring the matter up to date, and to correct where this was necessary, great caution must be used in applying the texts as statements of classical law. Very many of them have been altered. The alterations are called "Interpolations" and much attention and ingenuity have been exercised in the detection of them in recent years.

On the publication of the Digest, in A.D. 529, it was provided that it was to be the sole source of juristic law: no use was to be made of the texts in any earlier form. Almost at the same time were published

(iii) *The Institutes*. This was an elementary handbook for beginners and is still in use. Its general plan is based on that of Gaius, which the compilers were directed to follow, and much of its content is from the same source. Other books however were used, especially another work of Gaius, *Res Cotidianae*, and there is of course much that is new. It is hardly a part of the Codification, for it contains mostly what is in the Digest or the Code. But it does contain some rules not to be found elsewhere, and Justinian provided that it was to have the force of law. The codification was completed by

(iv) *The CODEX REPETITAE PRAELECTIONIS*. This was a new edition of the Code of Imperial Enactments, promulgated in A.D. 529, and embodying the many changes which had been found necessary in the course of compilation of the Digest. This is the edition which we possess: very little is known of that which it superseded. It deals with many matters not dealt with, or only touched on in the

Digest. It is in twelve *libri*, of which the first and the last four are mainly on ecclesiastical, criminal, and administrative law, and the private law which fills the central portion (Books 2–8) is not in the same order as in the Digest.

It was apparently supposed by Justinian and his advisers that the body of law thus provided would be permanent and would need but little change, but, in fact, fresh legislation was soon needed, and in the twelve years which followed the completion of the system there were many new enactments, mostly indeed on public law, but not a few making great changes in the private law. Most of them are in Greek. After Tribonian died (A.D. 546) there are relatively few. These *Novellae Constitutiones* were not officially collected, but private collections, more or less complete, were made in the sixth century. One of these, commonly called the *Authenticum*, in which the Greek enactments were translated into Latin, and another fuller collection in the original languages, are the main sources from which modern editions are made.

9. CUSTOM. *CONSUETUDO*. Primitive communities may be said to have no law: they live under customs. But a time comes, early in their development, in which the central authority enforces, or supervises the enforcement of, the customs, in which stage custom has become customary law. It is a much further step from primitive conditions when it is recognised that some authority can expressly make new law—the age of legislation. But the attainment of this stage does not put an end to customary law: in all ages a great part of the law is customary. In all ancient communities it seems safe to say that most of the law is of this character. Roman Law was much modified by legislation, but the background was the ancient “custom of the realm”; part of it, no doubt, primitive custom, but most of it really shaped, first by the pontiffs and later by the lay lawyers. It was this mass of unwritten law to which the name *ius civile* was first applied and when, in later days, the lawyers began to speculate on the source of the binding effect of laws, they explained this custom as resting on tacit consent of the people—the *tacitus consensus utentium* being, it was said, just as real an expression of consent as an act of legislation. But if long continued usage could make a law, it followed that it could unmake one, and accordingly Julian tells us that a *lex* was repealed by long continued disuse. This is an unsatisfactory notion, especially in

the absence of a rule to determine how long the disuse of the *lex* must have continued. Constantine enacted that custom was of no avail against express statute. This looks like an exact contradiction, but both texts are in Justinian's compilation. A possible explanation is that besides this general custom, the common law of Rome, which like all unwritten law was always undergoing silent modification, there were also local usages or customs. These too were binding within the region where they existed. It may be that Constantine merely provided that a local usage could not override a statute of general application. But Justinian no doubt meant more: his legislation was to be in no way at the mercy of usage. Julian's rule is preserved as explaining the disappearance of many ancient laws which had gone out of use long ago and were not expressly repealed by Justinian. In actual fact later history shews that custom was too strong for much of Justinian's legislation.

In Rome, as elsewhere, not every custom was binding: it must be certain, reasonable, and not contrary to the public interest. It should further be noted that while, apart from imperial *decreta*, there was no case law in Rome, there, as in modern systems with the same rule, a long course of decisions in a particular sense constituted a usage by which a *iudex* would be bound though no exact rule could be laid down for the application of the principle.

The story of the sources may be left with the remark that juristic texts are not the only source of our knowledge of the classical law. The lay literature is of less service than might have been expected, but considerable numbers of documents embodying or recording actual legal transactions have been discovered from time to time of which the most important are to be found in the current collections of texts. It may be added that in recent years help has come from another quarter. Study of the surviving writings of the Byzantine commentators, who were acquainted with the classical texts, has provided information on many points.

CHAPTER II

ARRANGEMENTS AND CLASSIFICATIONS OF THE LAW

10. Bodies of law, like other groups of facts, can be arranged in many ways. In the preceding chapter we have considered the ways in which law comes into existence, and, from this point of view, law may be classified as *ius scriptum*, that which is created by express legislation, and *ius non scriptum*, that which is the outcome of custom and practice—the *ius moribus constitutum*. The same distinction is expressed in the contrast between *lex* and *ius*, where *lex* means enacted law of any kind and *ius* means that part of the law above described as *moribus constitutum*.

In a developed civilisation the notions of law and morality are clearly distinguished. Law consists of those rules of conduct which the State, by means of its judicial machinery, will enforce. Morality consists of those rules of conduct which are habitually observed by well conducted people, but are not necessarily enforced by anything except public opinion. This does not mean that the two sets of rules are opposed, or even distinct. One of the chief functions of the law is the maintenance of morality, and from this point of view law may be described as that part of morality which in any community it is thought desirable to make compulsory. So close is the relation between law and morality, that, in any self-governing community, as views change on any point of morality, the trend of legislation will change too. But all this is subject to important limitations. It is often the business of law to prescribe details with which morality is in no way concerned. Thus, while it is obviously proper that a man should have reasonable notice of legal steps to be taken against him, the exact number of days prescribed is indifferent. There should be public holidays, but, apart from religious associations, their exact date is immaterial.

This view as to the relation of law and morality is that of a developed community: in a primitive society there is no such distinction. Morality and law are the same—custom, and the word *mos* covered them both in early Rome. So too, there as elsewhere, the custom was based on religion: what was right and lawful was

fas; what was unlawful was *nefas*. At this stage there was no distinction between *fas* and *ius*. But in Rome as elsewhere there early appeared machinery for the enforcement by the State of certain rules of conduct, and the rules so enforced were *ius*, while *mos* covered rules not so enforced. Again, in Rome, as in most States, though not in all, the law was early secularised, and the rules enforced by the civil machinery of the State (*ius*) were differentiated from those left to purely religious sanctions (*fas*). Rules of *fas* might well be a source from which new rules of *ius* would spring, and *mos* was of course the origin of a great part of the law: *ius moribus constitutum*.

In many texts institutions of the Roman Law are found referred to the *ius civile*, others to the *ius gentium* and even to the *ius naturale*. Something must be said on the meaning of this contrast. The *ius civile*, in the sense in which the expression is here used, means those rules which were, or were thought of as being, peculiar to Rome, many of them no doubt having their counterparts among the kindred peoples by whom early Rome was surrounded. In this sense the *ius civile* covers the results of legislation as well as the customary rules to which the name *ius civile* seems to have been first applied, and it is this wider sense which is most frequent in the classical texts. The *ius gentium* became prominent in the later part of the Republic, the result of much increased intercourse with aliens, large numbers of whom were trading with Rome or actually resident there. So early as 241 B.C., a special magistrate had been appointed—the *Praetor peregrinus*—to preside over litigation in which they were concerned. The rules applied in his Edict were mainly those of *ius gentium*, which, whatever their origin, a point already considered, were thought of as universally applicable. This idea of universality brought the *ius gentium* into close relation with another notion—that of *ius naturale*. In the last century of the Republic, after the conquest of Greece, there was a great influx of Greek ideas into Roman ways of thought. Greek philosophy began to enter into Roman education, and thereafter into legal thought, to an extent which is disputed, but which is in any case considerable. As might have been expected, the Romans were sooner attracted by Greek ethical speculation than by the metaphysics: and, in particular, they were influenced by the Stoic conception of life according to nature with its corollary of a

natural law—rules of conduct implanted in man by nature. This notion of a *ius naturale*, principles intuitive in man by his very nature, and capable of universal application, appears frequently in Roman sources. Occasionally it is declared to be the principle on which all law rests, but the habitual attitude of the Roman lawyers is different: *ius naturale* is an ideal to which it is desirable that law should conform, but it was not really at any time, for them, a test of the validity of a rule of law. So soon as any attempt was made to formulate any of these “natural” principles it became clear that they had a close affinity with rules of *ius gentium*, also thought of as universal. Hence we find the expression “*ius gentium aut naturale*,” which treats them as the same thing. But this does not actually represent the position of the Roman lawyers any more than does the view expressed in Justinian’s Institutes and attributed in the Digest to Ulpian¹, which identifies natural law with natural instincts. The fact that *ius gentium* and *ius naturale* were not identical was rendered obvious by the case of slavery, which was certainly lawful, and, so far as they knew, universal, and was therefore *iuris gentium*, while, by *ius naturale*, all men were born free.

The expression *ius civile* is also used to denote the ancient formal law, enacted or customary, as opposed to that created by the Edicts of the Magistrates, called the *ius honorarium*, *honores* being the collective description of the higher magistracies. This contrast must be carefully distinguished from that between the *ius civile* and the *ius gentium*, for though the principles embodied in the Edict express to a great extent the notions of the *ius gentium*, the two conceptions are by no means equivalent. There are many provisions of the Edict which are not expressions of the *ius gentium*, such as rules laying down details of procedure, and a great deal of the *ius gentium* has no connexion with the Edict: *traditio* is a good illustration.

II. For the purpose of a general exposition of the law none of the foregoing classifications or distinctions is very serviceable. The arrangements adopted in the Edict of Julian, in the general practitioners’ treatises, and, by descent from these, in the Digest and Code of Justinian, are based, roughly, on the course of proceedings in litigation and, whether they are scientifically

¹ D. I. I. 1. 3.

justifiable or not, do not provide a convenient scheme of exposition for instruction. The method adopted in most of the institutional treatises with which we are acquainted is entirely different. Justinian, in his Institutes, states as his primary division that into *ius publicum* and *ius privatum*, the latter being that part of the law with which we are mainly concerned. The Public Law, so called as early as Cicero, but not mentioned by that name in any surviving classical juristic text, is primarily the constitutional and administrative law, i.e., that of the powers, constitution and machinery of the public assemblies, the rules affecting the magistracy, and so forth, but it was also regarded in Rome as including the criminal law, probably because in early Rome the supreme criminal jurisdiction was in the *Comitia*. Justinian has some remarks on criminal law at the end of the Institutes, and, in dealing with the sources of law, we have had to say something of the public assemblies and the powers of the Magistrates. But, in the main, we are concerned only with the *ius privatum*, i.e., the law affecting the relations of people with each other in their everyday life, the law of personal capacity, of property, of contract, of inheritance, of injuries to person or property, and of remedies for the various wrongs. In the Institutes of Justinian, the *ius privatum* is arranged under three heads stated in a famous text: "*Omne ius quo utimur vel ad personas pertinet vel ad res vel ad actiones.*" This text is borrowed from Gaius¹, who is the earliest known source for this classification. It is probable, however, that it was not invented by him, but taken from some previous work, that it was in fact by his time a traditional arrangement dating perhaps from the Republic, adopted specially and perhaps exclusively for purposes of instruction. The exact interpretation of the proposition has been the subject of much controversy. It is most commonly rendered as meaning: Law is divided into three branches, the Law of Persons, the Law of *Res* or Things and the Law of Actions. But another explanation, which has something to be said in its favour, and which certainly goes further towards explaining the actual treatment of the matter in Gaius, is: every rule of law has three aspects, the persons it affects, the rights it involves and the remedies. We need not go into this controversy, but it will be well to indicate briefly the topics dealt with by Gaius and Justinian

¹ G. 1. 8; In. 1. 2. 12.

under each head, and to point out the chief points in which, in the following chapters, the method adopted by them is modified.

The discussion of persons in Gaius and Justinian is in effect a classification of the people according to their legal position, as slaves or freeborn or manumitted, under parental or marital control, or independent, and, if independent (*sui iuris*), of full capacity or under control of guardians. Gaius deals with some institutions which were obsolete in the time of Justinian, and says something incidentally of the distinction between Roman citizens and other people, a point which has become unimportant in the time of Justinian. In addition to this enumeration, we are also told how a person enters one of these classes and how he leaves it, what modern writers have called the Investitive and Divestitive facts of each particular status. But we are not in general told anything of the content of each status, i.e., of the special rights, duties, capacities and incapacities which it involves. Thus we hear little of the rights involved in parental control (*patria potestas*) or of the actual position of a slave, or of the effect of transactions gone through, or acts done, by persons in dependent positions. Much of this cannot be conveniently treated till the various forms of transaction are themselves discussed, but this is not true of all these matters. Justinian goes a little further than Gaius into these points, and modern expounders find it convenient to deal with many of them in connexion with the discussion of the status itself. That plan is adopted in the following chapters, but only so far as those points are concerned which can be understood without knowledge of the general law.

The topic of *Res* or Things may roughly be described as the main body of the law: the discussion of all those rights which have a money value, to the exclusion of such rights as liberty and *patria potestas* which cannot be expressed in terms of money. According to modern analysis, these rights can be grouped broadly under two heads—those rights, such as ownership, which are effective against every one (*iura in rem*) and those available only against specific persons, such as the rights under a contract (*iura in personam*). The expressions *ius in rem*, *ius in personam* are not Roman but are based on the terms *actio in rem*, *in personam*, by which the Romans distinguished the remedies for such rights respectively. The distinction itself between the rights, though not distinctly

formulated, appears clearly enough in the treatment of *Res*. Rights available against everyone, of which *dominium* or ownership is the most important, are treated first, inheritance being taken with them, the *hereditas* being regarded as a unit, to which the *heres* has a right against every one. Those rights effective only against specific persons, such as those arising from a contract or a delict, are treated last, under the collective designation of *Obligaciones*. From the Roman point of view the distinction is based on procedure, *obligaciones* being those rights enforced by an *actio in personam*: in effect it is a classification of rights. One result of the mode of treatment is that the law is treated as a system of rights rather than as one of duties, a fact not without significance. It should be added that in this branch of the law the difference in treatment between Gaius and Justinian is very marked. Gaius in general confines himself to a statement of the ways in which the various legal relations arise and are ended or transferred, but Justinian goes into detail as to the content of the right. And, for Gaius, *dominium* and *obligatio* are civil law conceptions, not applicable to praetorian rights, a limitation ignored by Justinian.

Actions, the third element in the scheme, are the remedies for the various infringements of right. The discussion is substantially a statement and classification of the different types of remedy (much more detailed in Justinian than in Gaius) together with a descriptive account of the procedure, i.e., of the steps to be taken by the parties in an action at law. This is what is commonly called Adjective Law as opposed to Substantive Law, which is the law as to the rights and duties made effective by these remedies, that is to say, the subject treated under the heads of Persons and Things. In the actual treatment of actions a small amount of substantive law is included, a rather inconvenient and illogical intrusion which may be due to the fact that some of these rights are enforced by very specialised forms of action and are therefore explained in connexion with the actions to which they give rise. Thus the liabilities of a *paterfamilias* on the contracts and delicts of members of his *familia* are stated in connexion with the actions, called by post-Roman writers *actiones adiectitiae qualitatis*, to which they give rise.

This scheme in which the substantive law is stated in two branches, and the adjective law coordinated as a third branch, is

open to, and has received, much criticism from the point of view of logical method. But it is not inconvenient as a mode of statement of the law, and, dating as it probably does from the time of the earliest efforts at systematic arrangement of the Roman Law, it seems to deserve the praise which Sir Henry Maine has bestowed on it, as a masterly piece of abstraction.

12. It will have been noticed that technical expressions were employed by the Roman writers in more than one sense, and it may be well to point out that the words *lex* and *ius* have themselves more than one signification. The primary meaning of the word *lex* is a statute of the *Comitia*. Such enactments are *leges latae* or *rogatae*, as opposed to *leges datae*, which are laws imposed on subordinate communities by the Roman magistrate, and *leges dictae*, which are regulations framed by imperial officials for the administration of imperial estates. Plebiscites are also freely called *leges*, being in fact submitted to the vote of the assembly (*latae, rogatae*), though it is not an assembly of the whole people, but only of the *plebs*. As we have seen, the later imperial enactments are also called *leges*. All these applications embody the notion of enactment, but the word also expresses the notion of declaration, and it has another sense which brings this out. The name is applied to conditions or terms in a transaction, e.g., in sale or pledge, *lex commissoria*, and in conveyance of property, *lex mancipationis*.

The word *ius* in Latin has some of the ambiguities which attach to the words expressive of the same notion in other languages (*Recht, Right, Droit, Diritto*). It may mean (sometimes called the objective sense) the law, and, with an appropriate limitative adjective, some branch of the law (*ius*, as opposed to *fas, ius civile, ius actionum*). It may mean (the subjective sense) a right (*ius hereditatis, ius servitutis*), but in practice it was usual to apply it in this sense only to what later analysis calls *iura in rem*, though applications of it to *iura in personam* are occasionally found. It also means, as we have seen, the unwritten part of the law as opposed to *lex, edictum*, etc. It also means the tribunal of the magistrate or the proceedings in that tribunal (*vocatio in ius, cessio in iure*). The lexicons give indeed many other meanings or shades of meaning, but the foregoing are the principal senses which the student will find it necessary to distinguish in reading the Institutional texts.

CHAPTER III

PERSONS: SLAVERY, CITIZENSHIP

13. Apart from definitions, the law is mainly concerned with the legal effects of the acts or abstentions of Persons, and the effects of any act or abstention may greatly depend on the position in law of the person concerned. An agreement by a slave does not produce the same legal effect as one by a citizen. An act by a child may have a very different effect from that of a similar act by an adult. It is therefore necessary, before entering on the main body of the law, to get some idea of those differences of position which are legally material.

The word *persona* itself is not free from difficulty. At first denoting a mask, it comes to mean the part played in life, and as every man, even a slave, plays a part in life, the word comes to signify merely human being. It is in this sense that it is used by the classical lawyers. A slave is, as we shall see, a thing, but he is also, in this sense, a person. But a more technical sense appeared—there are traces of it in the Byzantine age before Justinian—in which *persona* meant a being or group of beings capable of legal rights and duties. In this sense a slave is not a person, but practically everyone else is. But groups may also be persons, i.e., a body of men may be thought of as a right and duty bearing unit, having, that is to say, its own rights and duties, which are not those of its members individually. This is what is called Corporate personality, and, in Roman theory, followed by later systems, this kind of personality could be acquired only by authorisation of the State, either for the individual case or by some general provision. But where this corporate character existed, the group constituted a person, quite distinct from the members of whom it in fact consisted. Thus, in modern life, a shareholder in a railway company does not own an undivided share in the line: if he walks on it he is as much a trespasser as anyone else would be. The ratepayers, though they are the elements of the municipal incorporation, are not joint owners of the Guildhall. There is thus a fundamental difference between corporate and common ownership.

The principal corporate bodies which we shall meet are the State,

municipalities of different types, and private associations such as the ancient *sodalitates*. On each of these there is something to be said.

The State (*Populus Romanus*) must be thought of as an "original" corporation since its powers were not conferred on it by any higher authority. It was regarded as having all the rights of an individual person, so far as these were conceivable in such a case—there could, for instance, be no question of *patria potestas*. It differed, however, from other groups in that these were substantially bound by ordinary rules of form in their transactions. But the State bought and sold, transferred property and freed its slaves in any form it chose, and when it had to enforce its claims it did so not by action before its own courts, but by direct activity of its officials, a method which looks arbitrary, but was always safeguarded by the fact that any magistrate who exceeded his powers in such matters was personally liable after his term of office expired. But the importance of the *populus Romanus*, as a right and duty bearing unit, belongs mainly to the Republic: little is heard of it after the second century of the Empire. The Emperor has succeeded to its position and there is nothing corporate about the Emperor—he is a man. There is, indeed, some obscurity as to the Roman conception of the *Fiscus*, the imperial treasury, which had superseded the *Aerarium*, the treasury of the *populus*. It is probable however that fiscal property was regarded as belonging to the Emperor, though subject, as were other parts of the imperial property, to special rules of public law.

Municipalities commonly derived their powers and organisation from statutes separately conferred on them (though there was a good deal of legislation affecting them generally) and thus their powers were not uniform. And it would not necessarily follow from the grant of municipal status that all the rights of an ordinary person were conferred. Thus municipalities could not in general be instituted *heredes* under a will till the later empire, and the power to free their slaves was not generalised till the second century of the Empire.

Private incorporations are not prominent in the law. There were ancient religious *sodalitates* which had corporate character and there were large numbers of *collegia*, i.e., associations, having diverse objects, such as trade unions, friendly societies, burial

clubs and the like. There seems to have been little restriction on these during the Republic, and some of them were corporate, but there is some obscurity about this, and it is clear that the mere fact of being a lawful *collegium* did not imply corporate character. In 7 B.C. it was enacted that all new *collegia* required authorisation. It does not follow that authorised *collegia* were necessarily corporate, and it is probable that such a *collegium* was not corporate, without a special grant of this privilege, till late in the classical age. Another case of possible corporate character is that of concerns formed for the purpose of exploiting State contracts, such as *societates vectigales*, but these can be better considered under the law of *societas*.

When the Empire became Christian, the local Christian communities seem to have been regarded as corporations with the Bishop at the head, capable of owning and acquiring property, by will and otherwise. Property so held was earmarked for religious purposes, and could not be validly diverted. This suggested a method of creating permanent charitable trusts, a thing which it had been difficult to provide for in earlier law. Property was conveyed to the Church, as a corporation, earmarked for the charitable purpose, redemption of captives, almshouses, orphanages and the like. Towards the time of Justinian a further step seems to have been taken. Such foundations—*piae causae*—came to be made in such a form that the property was not vested in the Church, though the Bishop usually had a certain right of supervision. It is a much vexed question, into which we will not go, in whom the property was thought of as actually vested.

14. In considering differences of status it is convenient to use, as a basis of classification, the three conceptions which we shall later find serving as bases of the law of *capitis deminutio*—*Libertas*, *Civitas* and *Familia*.

Liberty and Slavery. Here the fundamental distinction is that every man is either a slave or a freeman: there is no intermediate status. The *Colonus Adscriptitius* whom we shall have to mention later, though he had very restricted rights, was technically a freeman. Slavery is defined by Justinian as an institution of the *ius gentium*, by which, contrary to nature, one man is subject to the *dominium* of another¹. By natural law all men were born free

¹ In. 1. 3. 2.

but slavery originated in war. What the definition means is that a slave is a chattel, the one kind of human being who can be owned. It does not follow that he always is owned: a slave, like any other piece of property, may chance to be without an owner. But the definition admits of being understood as meaning that a slave is always owned, and as in this sense it is not correct moderns have usually preferred to define slavery, for Roman Law in a more abstract way: slavery, it is said, is rightlessness. This is accurate enough in the earlier law, but in the late classical and later law, slaves did acquire certain protections which are in effect legal rights. But they are slight and create no practical difficulty.

In early Rome slaves were few, but with the extension of territory and great increase in wealth and commerce which marked the late Republic and early Empire slaves came to play an important part in Roman life, and the slave trade, by which the slave market was kept supplied, became an important though somewhat discredited business. It was not only in agricultural labour, handicraft and menial work that they were employed. A great part of the actual machinery of trade was in their hands, they were teachers, physicians, architects and so forth. Thus, though they were technically of one rank, there were great differences *de facto* between the hordes of semi-savages labouring on the great estates and the banker, philosopher, business manager and so forth. Public slaves employed on the public service were in some cases socially superior to the lower class of freemen.

The absorption of so large a part of commerce by slaves was rendered possible by the institution of the *Peculium*. Everything acquired by a slave, property or contract rights, belonged in law to the master; but it was usual to allow the slave a fund, the *peculium*, to deal with practically as his own, frequently with a power of alienation for business purposes. Though the master was not ordinarily liable on the slave's contracts he could be sued on them under Praetorian Law if there was a *peculium*, and was liable so far as the *peculium* would go. He must himself sue, if it was necessary, to enforce rights under a slave's contract, for slaves could neither sue nor be sued. Slaves could not marry or have any legal family relations, but, *de facto*, they entered on permanent relations similar to marriage, and though these were not directly recognised by classical law, at least so far as rights were concerned,

and only to a very small extent by Justinian, relationships through such unions constituted a bar to marriage, if the parties so related became free, as much as civil relationship would. And though slaves were chattels, bought and sold and left by will, like other property, there were provisions by which separations of slave families were to some extent guarded against. Slaves were liable for crime, by ordinary criminal proceedings, but, for delict, i.e., wrongs to other persons, for which an action would ordinarily lie, no direct proceedings were possible, since they could neither sue nor be sued. But so early as the XII Tables, and gradually extended to all delicts, there was a system by which the master could be sued and compelled to surrender the slave to the injured person unless he was prepared to ransom him by paying the damages. This system of "noxal actions," at first a power of buying off vengeance, while its practical effect remained unchanged in later law, was then thought of rather differently: it had become a liability in the master to pay the damages, from which he could free himself by handing over the slave—*noxae deditio*.

Like ordinary chattels, slaves were in strictness, and actually in early law, at the mercy of their masters: law afforded no protection against supreme domestic authority. Probably no protection was needed in the patriarchal conditions of early Rome. But, by the end of the Republic, increased wealth and luxury, with a vastly increased number of slaves and a relaxed social morality, made protection necessary, and it was provided. Crimes against the master were to be dealt with not by him but by the public courts. A *l. Petronia*, before A.D. 79, forbade the setting of slaves to fight beasts, as a punishment, except by a magistrate's authority¹. Claudius and Hadrian laid down rules against cruelty and the killing of slaves. But in all this the slave was still himself helpless: these laws were analogous to modern laws about cruelty to animals. Antoninus Pius took a significant step: he allowed slaves cruelly treated to take sanctuary, e.g., at the statue of the Emperor². The magistrate was to investigate, and if the charge was proved was to sell the slave on the terms that he was not to go back to his old master. This is very like giving him a right and it is one of the difficulties in defining slavery as rightlessness. There was further

¹ D. 48. 8. 11. 2.

² G. 1. 53.

legislation, and, under Justinian, the master could inflict only reasonable castigation.

It is clear that though a slave was a chattel he differed in many ways from other chattels. We shall deal later with many rules in which this is brought out, all expressing the fact that a slave, though *pro nullo* from the point of view of civil and praetorian law, is *iure naturali* a man.

Some of these may be briefly mentioned here. The child of an *ancilla* (*partus*) was not *fructus*, like the young of beasts (*fetus*), a rule with important practical results. Though not capable of *obligatio* in the strict sense, as he could neither sue nor be sued, a slave was capable of *obligatio naturalis*, an obligation only imperfectly enforceable¹, but, so far as it went, binding on him though he was freed. Certain forms of insult to a slave were actionable wrongs on which the master could sue without proof of any intent to insult him personally². Slaves could be damaged in ways not conceivable in relation to other things, e.g., by deterioration of moral character, and an *actio servi corrupti* was provided to deal with this. These special characteristics of the slave, together with his prominence in commerce, and the fact that his legal capacities differed from those of freemen, account for his frequent appearance in legal texts and make it necessary to have a clear idea of his position in the law.

15. There are many facts by reason of which a man may be a slave, but two of these—capture in war and birth of a slave mother—are much more important than any others. They were thought of as universal and thus attributed to *ius gentium*, the others, resting on Roman legislation, are *iure civili*.

Capture in War. This was in all probability the original source of slavery and was always the chief source of supply for the slave market. It was assumed to be a conqueror's right to kill all prisoners: to save their lives and sell them as slaves was an act of mercy, a doctrine expressed in the unlikely etymology of the word *servus* as derived from *servare*. What was true of those captured by the Romans was equally true of those Romans captured by the enemy: they too were thought of as slaves. This is certainly true for later law, but it has been suggested that in earlier law they were not thought of as actually enslaved, but only in *de*

¹ *Post*, § 133.

² *Post*, § 129.

facto slavery, a view very difficult to reconcile with texts, but intended to explain one remarkable element in the position—the law of *Postliminium*. The principle of this is that a captured Roman regained his old position in law and thus ceased to be a slave as soon as he set foot on Roman soil, provided he returned as soon as he could and there was nothing discreditable about his capture. In the interval everything was in suspense. If he died in captivity he was treated as having died at the moment of capture. But this is subject to some qualifications. Possession, as opposed to ownership, was a question of fact: it was definitely lost by capture and did not revive by *postliminium*; there must be a retaking¹. Marriage was ended in classical law and did not revive except by consent, but, under Justinian, the wife could not remarry for five years or so long as the captive husband was certainly alive². Enslavement would ordinarily destroy a will, but by an interpretation of a *lex Cornelia (fictio legis Corneliae)*³ the will of one who died a captive took effect as if he had died at capture; and a previously made will was valid if he returned with *postliminium*. It should be added that if one was redeemed for money, *postliminium* did not operate till the redeemer was paid off; and if the captive had been not a *civis* but a slave he did not revert to his old master until he was actually possessed by someone.

Birth. By *ius gentium*, descent was traced from the mother, so that the child of a female slave, of an *ancilla*, was a slave whatever the status of the father. And, on principle, the status of the mother at birth was decisive. But, *favore libertatis*, a modification of this rule appeared in the classical law: a child was free if the mother was free at any time from conception to birth. There were however circumstances in which the child of a freewoman was a slave. The *sc. Claudianum* allowed agreements between the owner of a slave and a freewoman under which she might cohabit with the slave, remaining free, but children were slaves of the father's owner. Hadrian abolished this. Conversely there were cases in which though the mother was a slave throughout the period of gestation the child was free. These resulted from special legislation for specific cases of hardship, e.g., where a woman was freed under a condition and before this was satisfied she became incapable of freedom—her child was not to be prejudiced, or she was freed

¹ D. 41. 2. 23. 1.

² Nov. 22. 7.

³ D. 35. 2. 18. pr.

under a will, but the *heres* delayed his entry so that the child was born before she was free¹, and other cases of the same kind. And there was a rule that if a freeman had a male child by a slave whom he supposed to be free, the son was free. Vespasian abolished this anomalous rule.

The other causes of enslavement, those *iure civili*, are less important. Some cases belong to early law and had disappeared by the Empire, e.g., under the XII Tables a thief caught in the act was enslaved. The same rule applied to one who evaded the census or in any way evaded military service, and one who failed to satisfy a judgment was sold into foreign slavery.

Some causes of enslavement Justinian abolished, e.g., *servitus poenae*, which, he says, rested on express enactment. The rule was that those condemned to perpetual labour in the mines or quarries of the State became slaves, and those sentenced to death were slaves till the execution. A *servus poenae* was not State property: he had no owner. If he was pardoned, his old rights did not revive unless there was also a decree of restitution, which might restore property rights or family rights or both according to its terms. This slavery of convicts was abolished by Justinian in A.D. 536.

By a *sc. Claudianum* (A.D. 62) it was provided that a freewoman who cohabited with a slave after notice of his owner's prohibition, became his slave subject to decree of a magistrate. There were restrictions if she was a *filiafamilias* or a *libertina*. The rule was abolished by Justinian about A.D. 532.

Of the *iure civili* causes of enslavement retained by Justinian only two need be mentioned. Ingratitude of a freedman was punishable in various ways; in extreme cases, from the first century of the Empire onward, by re-enslavement. The extreme penalty was rarely inflicted and never unless the manumission had been entirely voluntary and gratuitous. The other case is that of fraudulent selfsale. If a man of full age took part in a fraud by which he was sold as a slave in order to claim his liberty and share the booty with his accomplice, a practice very easy in a community in which a slave might well be of the same race as his master, he was barred from claiming his liberty and became a slave, at any rate if he had received any of the spoil². But a relief, applied in a special case by Hadrian, became later a general

¹ D. 40. 5. 55. 1.

² In. 1. 3. 4.

rule: such a man might redeem himself by repaying the whole of the price.

The effects of enslavement of one who has been a Roman citizen are in the main obvious. His family and property rights pass from him, and his debts cease to bind him, though those who get the property take it subject to these debts. We are told that enslavement is akin to death, but it has not quite the same effects. Death brings a will into operation: slavery annuls it. And property does not ordinarily pass to the natural successors, but in some cases to the person into whose ownership the man goes, in others to the State. So complete is the destruction of identity that if the man is subsequently freed, he does not ordinarily revert to his old rights and liabilities. This is indeed an illustration of the notion of *capitis deminutio*, to be considered later.

16. RELEASE FROM SLAVERY. Though slavery was in principle lifelong, there was a power of manumission and in fact large numbers of slaves received freedom. No doubt the gangs of slaves employed on the large estates were not often freed but those employed about their master and in commerce had a much better prospect. It was not unusual to allow a slave to buy his liberty with profits made in dealings with his *peculium*, and, in fact, the frequency of manumission with the resulting multiplication of a rather undesirable class of citizen led, as we shall see, to restrictive legislation early in the Empire. A freedman is a *libertinus*, as opposed to an *ingenuus*, one born free. The name *libertus*, which also means freedman, expresses his relation to the person who freed him—his *patronus*. A *libertinus* freed by Titius is *libertus Titii*. The act of release is called Manumission.

During the Republic there were three recognised modes, and as manumission was a grant not only of freedom, but also of citizenship, these methods were all in theory under the control of the State, though in historical times this control had become rather unreal.

(i) Enrolment on the Census list of *cives*. This was a list prepared by the Censors every fifth year. The slave appeared, the master's consent was shewn and the name was enrolled, probably subject to the Censor's approval. There could be no question of conditions. The ancient formal census disappeared very early in the Empire, but as it was not expressly abolished Gaius still speaks

of this method in the present tense, though it was in practice obsolete.

(ii) *Vindicta*. This was a fictitious claim of liberty—an action brought in the form which would be used in a genuine claim that a man was wrongly held in slavery, *causa liberalis*. Some person (*adsertor libertatis*) claimed on behalf of the slave. This, under the ancient system of procedure, involved touching the man with a wand, which gave the process its name. The master similarly touched him, but made no counterclaim and either did nothing or went through symbolic actions shewing that he made no claim to the man. The magistrate then declared the man free. The details differ in some ways from those of actual litigation, and it is disputed whether it is properly regarded as fictitious litigation, but in any case it is in the form of an action and the magistrate's declaration resembles a judgment. From the form follows the rule that there could be no question of conditions or suspense: this was impossible in a judgment. The forms were much relaxed in later law. It is essentially a case of *cessio in iure*¹.

(iii) *Will*. This was by far the most usual method of manumission: it cost the testator nothing, and it provided a number of grateful freedmen to follow in the funeral procession. Wills were originally made before the *Comitia*, which provided the public control. But, long before the end of the Republic, this method was superseded by the will *per aes et libram* from which this element was absent. The gift must be *nominatim*, i.e., with a clear description of the person meant. Express imperative words must be used (*liber esto, liberum esse iubeo*) and thus there could be no implied gifts of liberty. But in the time of Justinian an *institutio* of the man as *heres* was held to imply a gift of freedom, without which it would be a nullity, and he laid down the same rule where a slave was appointed guardian (*tutor*), this office being possible only to a freeman. It seems indeed that in classical law this had been treated as a direction to the *heres* to free, a fideicommissary gift of liberty such as we shall shortly consider.

Manumission by will differed in one important respect from the other forms: it could be subject to *dies* or condition. *Dies* is suspension till some future time. A conditional gift is one which is made to depend on some future and uncertain event. Thus "if

¹ *Post*, § 46.

he learns Greek" is a condition, for it is future and uncertain; "if he was born in Rome" is not a condition, for it is not future or uncertain, though the facts may not be known; "if still in my household at the time of my death" is not a condition, for it is not future or uncertain when the will operates. Impossible conditions were struck out, and did not, as might have been expected, nullify the gift. But for this purpose impossible means impossible in the nature of things, e.g., "if he touch the sky with his finger." Impossibility merely to the person concerned was a different matter—this would annul the gift. Negative conditions, "if he does not do such and such an act," created a difficulty, for in many cases the act might always continue possible, so that the gift could never take effect. The difficulty was met, more or less, by allowing the testator to impose the condition of taking an oath not to do the act. It was a poor safeguard, for if the oath was broken there was no redress. It should be noted that in classical and later law this was the only case in which the condition of taking an oath was allowed. In other cases the Praetor remitted it. Till a condition was performed the man was still a slave (except indeed that if it was something to be done by him, and he was prevented by something beyond his own control, this was regarded as satisfaction) and thus could in general be dealt with as an ordinary slave. But fulfilment of the condition annulled anything done to the prejudice of his liberty, and the equivocal position of one conditionally freed (*statuliber*) was so far recognised that he was protected from certain forms of indignity to which an ordinary slave was liable.

Testation was subject to many restrictive rules, both as to form and as to content, in particular, as to the persons who could receive benefits. Testators evaded the difficulties by requesting the *heres*, either in the will or in a separate document, to carry out the testator's desire, which could not be directly provided for. Such a request could not be enforced under the Republic: it rested on the good faith of the *heres* and thus such provisions were called *fideicommissa*. Under Augustus such requests became enforceable and *fideicommissa* of liberty were a common case. The result was a great enlargement of the power of giving liberty. A *heres* might be directed to free a slave of the testator's, the point of adopting this method, rather than making a direct gift, being that in this

way the *heres* would have the rights of patron. Such a direction could be given to a *heres ab intestato*, i.e., without a will. Or the *heres* might be directed to buy and free a certain slave. And any beneficiary under a will, e.g., a legatee, might be directed to free a slave or to buy a certain man and free him. Wherever the gift was accepted, the direction must be carried out, subject to some restrictions which we need not consider. One in whose favour such a gift had been made was in much the same position as a *statuliber*.

These three methods were the only modes of manumission under the Republic, and they were available only to the full civil law owner. If an owner purported to free, but did it informally, or if a man entitled at praetorian, but not at civil, law, purported to free, however formally, the act was void. But in the later Republic the Praetor intervened. Where a civil owner freed by letter of enfranchisement (*per epistolam*) or by declaration before witnesses (*inter amicos*) or where a merely praetorian (so-called bonitary) owner freed in these modes or formally, the Praetor protected the man so dealt with in his personal liberty. He restrained any attempt on the part of the master or his successors to revoke the concession and compel the man to serve as a slave. But he was still a slave. His acquisitions were the master's and the child of a woman in this position was an ordinary slave. Persons so freed were said to be "*in libertate tuitione praetoris*," or "*in libertate morari*."

17. The first half century of the Empire was marked by legislation producing great changes in the law of manumission. Slaves had been freed in such large numbers that *libertini* were an important element in society. History shews them prominent in all fields, almost monopolising some branches of public service. Many of them were men of high character, but many were not, and it could not be forgotten that they came of a class whose untrustworthiness was proverbial—"quot servi, tot hostes." Their numbers may well have seemed a menace to the stability of the State, and, further, the Emperor would hardly favour a mode of grant of *civitas*, over which he had no control. These considerations led to the enactment of two restrictive statutes, the *l. Fufia Caninia* and the *l. Aelia Sentia*, the provisions of which must be shortly stated.

The *l. Fufia Caninia* (2 B.C.) set limits to the number of slaves

who might be freed by will, always the occasion of the most improvident manumissions. It provided that a man with only one or two slaves could free all, but if he had more only a certain proportion, the proportion decreasing as the total number increased, and never more than 100. The *lex* and *scc.* based on it contained provisions against evasions.

The *l. Aelia Sentia* (A.D. 4)¹ provided, *inter alia*:

(i) The manumitter must be twenty, otherwise the manumission was void, unless effected *vindicta* for a sufficient *causa*, e.g., merit, service rendered or to be rendered, intent to marry a woman so freed and so forth, the *causa* being approved by a body called a *consilium*, consisting at Rome of five senators and five *equites* and elsewhere of twenty *recuperatores* who must be *cives*. Transfers to another person that he might free, and other evasions, were stopped by *senatusconsult*.

(ii) The slave must be over thirty or he did not become a *civis*, unless it was *vindicta* for cause approved as above. The effect would be that the man would be *in libertate tuitione praetoris*, or, after the *l. Iunia*, to be mentioned shortly, a Junian Latin. Thus, *causa* apart, if he was under thirty the form was indifferent, though it is possible that if it was *vindicta*, it was simply void.

(iii) Manumission in fraud of creditors or patron was void. The first case is that of one who frees slaves when he knows that he is insolvent or that the manumission will make him insolvent. It was, in general, necessary to prove that creditors would suffer, but if it was by will, the gift was void even though a solvent *heres* entered so that creditors were paid in full, no doubt to avoid the risk of refusal and intestacy. The other case, of which little is known—it is not mentioned by Justinian—is that of manumission so as to prejudice the rights of the patron in the succession to the *libertus* on his death. In neither case was the gift void unless steps were taken, so that, for a time, the *status* of the man would be uncertain: he was a *quasi-statuliber*. In neither case did the rule apply except to voluntary manumissions, e.g., not where the manumitter was bound by *fideicommissum* to free. It may be added that this rule applied, though the other provisions did not, where the manumitter was not a *civis*.

(iv) Degraded slaves who had been punished ignominiously for

¹ G. I. 36 sqq.; In. I. 6.

misconduct became on manumission neither *cives* nor Latins, but were put *in numero dediticiorum*. They could never become *cives* and were subject to other disabilities to be considered later.

(v) None of the provisions above stated were to apply if the manumission was by will and the testator, being insolvent, freed and instituted a single slave in order to have a *heres* bound to enter (*heres necessarius*), so as to avoid the risk of intestacy and posthumous insolvency. But the exception did not apply if any other *heres* entered under the will.

The *l. Iunia*¹, called by Justinian *Iunia Norbana*, is of uncertain date, but either a little before or not long after the *l. Aelia Sentia*. A date commonly assigned is A.D. 19. It provided that those who in earlier law would have been *in libertate tuitione praetoris* should be free, but not *cives*. They were to have the status of Latins, distinguished as *Latini Iuniani*, and under some special disabilities. Their position will be considered later.

When the Empire became Christian a practice grew of freeing slaves in the church, before the congregation, a form of manumission *inter amicos*, giving Latinity till Constantine enacted that it should give *civitas*. Late in the Empire a new mode of informal manumission giving Latinity appeared—*in convivio*. Practically this was *inter amicos*, but it expresses the fact that now any form of declaration with witnesses sufficed.

Justinian greatly modified the law of manumission partly as an indirect result of other changes, partly by direct enactment. As, under him, practically all freemen were *cives*, and all ownership was civil, much of the law was obsolete. He repealed the *l. Fufia Caninia* and the *l. Iunia*. Implied gifts of liberty were allowed and thus appointment of a slave as *heres* or *tutor* amounted also to manumission. Informal modes had the same effect as formal, but in some of them writing and five witnesses were required. Thus the chief rules of manumission as laid down by him were:

- (i) Every valid manumission makes the slave a *civis*.
- (ii) The master must be twenty or the manumission is void, with the same exception as in earlier law, and a new one. As we have seen, it was always possible to free by will at the earliest age

¹ G. 1. 16 sqq.

for testation (fourteen) to provide a *necessarius heres*. Justinian allowed it in any case by will at seventeen, and later at fourteen.

(iii) It must be *nominatim*, i.e., with a clearly identifiable description. An unborn child could be freed by the description "*qui ex ea ancilla nascetur*."

(iv) The slave need not consent except in case of *fideicommissum* purely for his benefit.

(v) It must be by the owner: no representative can act except that a son in the family may free, for his father, *vindicta*, by authorisation. Whether this was possible in classical law is disputed.

(vi) Manumission in fraud of creditors is void.

(vii) It must be perpetual and is irrevocable. Whatever frauds or errors there may have been in a manumission which has once taken effect, it cannot be set aside on account of these, though, as we have seen, it can be rescinded, by magisterial decree, in extreme cases of ingratitude.

(viii) It may be conditional or *ex die*, unless it is *vindicta*.

18. Of the many special restrictions on manumission, two or three have some importance in private law. A slave specifically pledged could not be freed without the creditor's consent even though the debtor was solvent, but the act might be construed as informal manumission conditional on discharge of the pledge. A slave owned in common could be freed only by concurrence of all his owners¹, till Justinian allowed it with compensation of the other owners. A slave in whom a life interest (usufruct) existed could be freed by concurrence of both owner and fructuary. In classical law if the owner alone freed by will, this was construed as conditional on expiry of the usufruct. Justinian allowed it to take effect in all cases, but the man, though technically free, was bound to serve the usufructuary, so long as his interest would have lasted².

In a few cases in which a manumission had from some cause proved abortive, relief was given and the liberty took effect either *ipso facto* or by decree of a magistrate. Thus if a *hereditas* passed to the fisc, for failure of any *heres* to accept, gifts of liberty were good. If a *fideicommissarius* to free failed to carry out the trust, it was provided in the second century that the Praetor should declare

¹ U. I. 18.

² C. 7. 15. 1.

the man free. Where a man was transferred *inter vivos*, to be freed, and this was not done, he became free, *ipso facto*, by a provision of M. Aurelius, from the date at which he should have been freed. There were analogous provisions where a slave had been bought with money provided on his behalf (*suis nummis emptus*), and, somewhat later, where a slave's master had taken money under an undertaking to free him¹. The reason why special provisions were needed for these cases, though some of them look like ordinary bargains which might be enforced in ordinary ways, was that the beneficiary, a slave, had no access to the law courts. Another case of a different type, in which relief was given was that of a *heres* under a will, who, being also entitled on intestacy, took in that way so as to defeat the gifts in the will. A more prominent case is that of *bonorum addictio libertatium conservandarum causa*². This was a provision of M. Aurelius that if no *heres* accepted, and the creditors were about to sell the estate, it might be assigned to a slave freed by the will, who had to give security for the payment of debts in full. Gifts of liberty would then operate as if a *heres* had accepted. The rule was extended to cases in which there was no will, but liberty had been given in an informal document, a codicil—by *fideicommissum*. Later, even an outsider might apply with similar effect. Justinian allowed application by a slave not freed, who would thus get liberty. He also allowed application within a year after the sale of the estate, and even, with consent of the creditors, where security was for less than the full amount of the debts. As the security must in all cases be provided by an outsider, for a slave has nothing, such a transaction, apart from considerations of affection, relationship or the like, was, in effect, a speculation on the future earning capacity of the slave, when freed, with the estate.

There were circumstances independent of manumission in which a slave might gain liberty. It might be given as a reward for informing of certain crimes. It might be given as a penalty on the master: a slave abandoned in sickness became a Latin in classical law, a *civis* under Justinian. Under Constantine, one who saved and reared an exposed child might bring him up as a slave or free: under Justinian the child was always free and *ingenuus*, whatever he really was by birth, which might or might not be known.

¹ D. 40. 5. *passim*; D. 40. 8.

² In. 3. 11. 1.

Reference will be made later to the disabilities of *libertini* under the general law, as compared with *ingenui*. More practically important are the special relations which existed between the *libertus* and his manumitter, his *patronus*. There was a close tie between them, expressed mostly in rights of the patron and obligations of the *libertus*. But there were obligations the other way. There was a mutual duty of support in need. Though the patron could claim certain services he could not treat the freedman as a slave. In classical law, the patron could not, and in later law he need not, give evidence against his *libertus* in criminal cases. Apart from these points the chief rights of the patron were the following:

(i) *Iura in bonis*, a right of succession in the absence of children, the exact limits of which will be considered later¹. It rests on the XII Tables, and it has as a corollary, the right of guardianship over a *libertus* under puberty—*tutela legitima*. Some of the rules indicate that this right to *bona* was thought of as a substitute for the services which had been lost by the death.

(ii) *Obsequium*. This obligation of respectful and dutiful conduct can hardly be exactly defined. The *libertus* might bring no discrediting action against the patron nor any action without a magistrate's leave. He could take no part in criminal proceedings against the patron. A *liberta* freed for the purpose of marriage could not refuse.

(iii) *Operae*. If the manumission was voluntary and gratuitous the patron might exact a promise of *operae*, services suitable to the character and training of the *libertus*. These were a serious burden and might not be excessive. If not rendered they were enforced by a *iudicium operarum*, an action in which an *opera*, a day's work, was reckoned as a specific sum of money. Hence they could be redeemed in money, though they might not be originally so fixed. The right to services did not necessarily pass to the *heres*, and it was extinguished if the *libertus* had two children, or, in the case of a *liberta*, by her marriage, or reaching high rank, or attaining the age of fifty.

The fact that obligations were mutual is expressed by the rule that the patron's rights were extinguished by certain acts of his inconsistent with them, of which may be taken as examples, reclaiming the *libertus* as a slave or forcing on him an oath not to marry.

¹ *Post*, § 88.

This account of the rights of the patron applies fully only to those manumitters whose acts were entirely voluntary. One who freed under a *fideicommissum*, or a gift *ut manumittatur*, had not full rights to *obsequium*, and there were other restrictions. But, apart from misconduct, all patrons had the right of succession.

19. *CIVITAS*. The second point of view from which people may be classified is that of citizenship. In modern Western civilisation, this point is much less important than it was in classical Rome. Law is territorial and, over much the greater part of the private law, it matters little whether a man is a citizen or an alien: all are bound by the same law. In ancient days the point of view was different. The Roman law was for the Romans, and, as we have seen, the law applied to foreigners in Rome was the simple system of *ius gentium*. But there is a further complication. A British subject is normally a British citizen. In Rome things were very different. There was a continuous extension of citizenship as territory extended, at any rate after the Social War of 90 B.C., before which *civitas* had been given only sparingly to communities coming under the domination of Rome. But such grants never kept pace with extension of territory, and throughout the classical age there were large areas of the Empire the inhabitants of which were not Roman *cives*, but were either mere *peregrini*, or in the more privileged class of *Latini*, and living under laws more or less different. Each of these classes, with their subdivisions, must be considered.

Cives. The important distinction among *cives* in early law is that between Patrician and Plebeian. We have already noted the long struggle as the result of which the Plebeians acquired political equality or rather supremacy. The complete exclusion of Plebeians from the political and religious life of the old Patrician gentile State implied, in the conditions of the time, their exclusion from much of the private law. But this disappeared very early. A *l. Canuleia* (445 B.C.) allowed intermarriage between Patrician and Plebeian. All importance of the distinction, for private law, had disappeared long before the end of the Republic and we shall have little occasion to refer to it. Nor need we discuss the question whether the distinction between Patrician and Plebeian was racial or of some other character. It seems to be the dominant opinion that the plebeian element, which existed also in the kindred

Italian communities, owes its existence to a variety of causes of which the chief may be immigration, capture not accompanied by enslavement, and descent from freedmen whose tie of *clientela* with the patronal family had for some cause ceased to exist. For the same reason, their early disappearance from the legal system, we need not discuss the position of *clientes*, dependents of patrician families, consisting apparently of freed slaves and their issue and immigrants who had placed themselves, for protection, under the control of a patrician *paterfamilias*.

By the close of the Republic all *cives* have, broadly speaking, equal rights at private law, any practical differences being due to their position as head or subordinate in a family. There appear indeed early in the Empire some privileged classes, and there are groups which for different reasons have restricted rights. Augustus founded the *ordo senatorius*, which consisted of senators and their descendants to two generations. So far as private law is concerned, their privileges are in fact restrictions. They may not marry freed persons and they cannot engage in the lucrative business of government contracts. The *ordo equester* is in name and origin associated with the old military equestrian centuries, but it was much altered. It was in fact a select class chosen by the Emperor for life, from among the wealthy. They tended to grow wealthier, as government contracts were mainly in their hands. They held the chief financial offices of State and military officers were mainly appointed from their ranks. The point at which their privilege most nearly touches private law is the fact that they were the chief element in the list of *iudices* (*album iudicum*) by whom in classical times lawsuits were normally heard and decided. We have already seen that they formed part of the *consilium* in manumission under the *l. Aelia Sentia*.

The chief classes under special disabilities were:

Libertini. They were subject to political disabilities, but these did not prevent them from rising to high office and amassing great wealth, so that the rich *libertinus* is a favourite subject of satire. In the second century they became admissible to the *ordo equester*. The main points of private law affecting them are that during the Republic they might not marry *ingenui*, or, under the Empire, persons of senatorial rank, that they might not be adopted (*adrogati*) by any *ingenuus*, other than their patron, and that their oath to

render services to their patron provides the only case in which an action lay on *iusiurandum*, as a contract.

Coloni adscriptitii, in effect, serfs. They may be anterior to Constantine, but become prominent only in his time. They are the most striking illustration of the tendency of the later Empire to the creation of hereditary status, the binding of children to the vocation of the father. These *coloni* are the cultivating class who, over most of the territory of the Empire, supersede the independent cultivators of earlier law. They could not abandon the land or sell it or their property. On the other hand the landlord could not remove them or raise the rent. The status was hereditary, and there was no release by manumission, though agreement that the land should be held free of the burdens had a similar effect. In general the *colonus* could bring no action against his lord. At one time, but not permanently, there was a rule that thirty years' apparent independence barred the lord's right. Under Justinian it was barred by attainment by the *colonus* of a bishopric. The position could arise by lapse of time, voluntary undertaking and denunciation, i.e., landlords by denouncing vagrants could have them assigned as *coloni*. Such folk seem to be intermediate between slave and free, but they were undoubtedly free, having all rights not expressly barred. They were *cives*. They could marry and engage in ordinary transactions. They were the subject of a great mass of legislation, so that their obligations varied at different times and in different places.

Infames. This class originates in the *nota censoria*, a mark put by the Censor in the census list which imposed political disabilities on the *notatus*. The Censor had a free hand, but seems to have so noted mainly cases of gross misconduct, discreditable avocations, condemnation in certain actions, and, perhaps, breach of informal undertakings not yet enforceable by action. Of later origin, but overlapping in time, is a praetorian system of the same kind. The Edict provided that certain persons might not act as advocates (*postulare*), or be, or appoint, representatives in litigation (*cognitores, procuratores*). Some of these exclusions turn on misconduct, the list resembling the Censor's cases and no doubt inspired by them. The exclusion may be total or partial. The name *infamia* is used in these cases, the subjects being *infames*, but the expression does not seem to have been technical till about the

end of the classical age. Partly by legislation and partly by *interpretatio* many other cases of *infamia* were added, and in Justinian's texts the word *infamia* (*infamis*, *famosus*) is constantly substituted for the words descriptive of the actual disqualification. *Infames* could hold no office, but the above procedural disabilities are the most important.

Intestabiles. This is a class akin to that of *infames*, indeed overlapping it. So early as the XII Tables some persons were declared *intestabiles* and there was later legislation, some making persons *intestabiles* generally, some declaring persons incapable of giving evidence in particular cases. Those generally *intestabiles* could not be witnesses in a litigation or act as *testes* in any formal transaction in which these were required by law. According to some jurists¹ they could not have witnesses on their behalf, which would exclude them from legal protection, and would prevent them from engaging in formal transactions or from making a will.

20. *LATINI*. Three classes come under this general head. The original *Latini* from whom the name is derived were the men of Latium, with whom were grouped in the nomenclature of later times, as *Latini Veteres*, the members of colonies founded by cities in the Latin League up to 337 B.C., and some later colonies founded by Rome, consisting of persons who abandoned their Roman citizenship in return for grants of land in the colony. These Latins had practically the same rights in private law as Roman citizens and they had even, by a historical survival from the Latin League, the right of voting in the Tribes, but no other political rights of *cives*. All these communities gained *civitas* at latest by the time of Julius Caesar, many of them indeed at the time of the destruction of the Latin League in 337 B.C. A second group of Latins are the *Latini Coloniarii*. These are the inhabitants of colonies of later foundation, in some cases communities set up by Rome and consisting of emigrants, as in earlier days: in others, cases of grants of Latinity to existing non-Latin communities. They continued to be founded in the first two centuries of the Empire, always further and further out, as *civitas* was extended, and they disappeared under Caracalla. These Latins shared the Roman law (*commercium*) but not the right of Roman marriage, unless this was expressly conferred (for each community had its own charter), and

¹ D. 28. 1. 26.

thus not the rights of succession which were based on birth of a Roman marriage. They could hold no Roman office. A distinction is found between *maius* and *minus Latium*. Where a town had *maius Latium*, the local magistrates and the *decuriones*, members of the local governing assembly (*curia*), acquired Roman citizenship; in the other case only the magistrates.

The third group is that of *Latini Iuniani*. These are the inferior class of freedmen created by the *l. Iunia*, already mentioned. The application of the name Latin to *Latini Coloniarii* is a misnomer, for these communities were not usually of Latin race. In the present case the extension goes still further. For these new Latins are merely accidentally connected: with them the name has no racial or local signification whatever. They had not the political rights of other Latins. In private law they had the rights of colonary Latins, subject to their duties to the patron, and to express limits imposed by legislation. These were in fact very serious. They could not contract civil marriage. They were said to become slaves at death, so that their goods reverted to the patron as *peculium*, children of the Latin having no claim. By express provision of the *l. Iunia* they could not make a will or take a *hereditas* or legacy or be appointed *tutor* by will. Apart from this they had the ordinary rights of *commercium* with access to the law courts.

PEREGRINI. Of this class, taken, for convenience, as distinct from that of *Latini*, though these were really a privileged class of *peregrini*, there were two types. The original *peregrini* were the members of foreign communities outside the Latin group, with which Rome had friendly relations. These were gradually incorporated in the Roman State, and in the texts the name *peregrini* commonly denotes inhabitants of those outlying territories which had never received Roman or Latin rights. These *provinciae* covered an enormous area, and, notwithstanding the steady extension of civil right, the *peregrini* remained a very large proportion of the people through the classical age. Scattered over the provinces there were municipalities on which civil or Latin right had been conferred, but apart from these the provinces retained their own law with little modification from Rome. They had no share in typical Roman institutions. Peregrines could hold no Roman magistracies (*honores*), had no vote in Roman assemblies (*suffragium*),

could not in general contract a Roman marriage (*conubium*) and had no share in the specially Roman part of the private law (*commercium*). But this last was less important than it looks. Much of the law was *ius gentium*, in which they shared, e.g., nearly all the law of contract. They could not use formal Roman modes of transfer of property, but the simple method of *traditio* was available. In some places the *ius italicum* was given, which made Roman rules applicable to the transfer of land, though it did not otherwise alter the status of the inhabitants. As we have seen, there were at Rome special tribunals under the control of the *Praetor peregrinus* for cases in which peregrines were concerned. And in some cases the device of *actiones ficticiae* was utilised, by which actions were brought by or against *peregrini* with the fiction that they were *cives*.

The other group of *peregrini* were *dediciti*, a name originally applied to members of communities which had surrendered to Rome, but had as yet received no constitution, and to members of certain treacherous communities. To these were added by the *l. Aelia Sentia*¹ (and it is these with whom our texts are mainly concerned) slaves of a criminal or degraded type who were manumitted. They could not become *cives*. If they sought to live within one hundred miles of Rome they were sold into slavery beyond that limit, and if then freed would vest in the State. Like other peregrines they had the *ius gentium*, but they could make no wills, as they were not members of any community. On their death their goods passed to their old owner.

21. To pass from the class of *Latini* or *peregrini* to that of *cives* was not easy during the Republic. *Civitas* was given sparingly till after the Social War (90 B.C.). But in the Empire there were many ways in which a Latin could become a *civis*. Office in a Latin colony is an early case. Rules established early in the Empire gave *civitas* as a reward for certain services to the community: building a ship and trading to Rome, service in the *vigiles*, working a mill of a certain size. It was given to any *Latina* who had three children. In these cases, and also where *civitas* was conferred, of favour, by imperial decree, on an individual Latin or a community, if a beneficiary was a Junian Latin the rights of the patron were unaffected.

There were other cases, in which the Latin became a *civis* for

¹ G. I. 13.

all purposes. Thus repetition of the manumission (*iteratio*) without the defect which had caused it to give Latinity gave *civitas*. A case of evidently great practical importance was that of *Anniculi Probatio*¹. The *l. Aelia Sentia* provided that a Junian Latin freed under thirty, on marrying a *Latina* or a *civis* (before seven witnesses aware of the purpose of the marriage), and having a child a year old, could prove these facts before the magistrate, and acquire *civitas* for himself, and for his wife and child, unless the wife was already a *civis*, in which case the child was a *civis* on general principle. He would also acquire *patria potestas* over the child. In the event of his death before taking steps, the widow could make the proof: if both parents were dead, the child could, in order to inherit from the father. In A.D. 72 the right was extended to all Junian Latins, an extension clearly reasonable, but involving some change of principle. For the original rule gave the privilege only to persons who would have been *cives* if the *l. Aelia Sentia* had not been passed, while under the extension persons would become *cives* who would not have been such before the *lex*, e.g., those informally freed. The rule applied only to Latins. It follows that it did not apply to one who, having been a Latin, had already acquired *civitas* by one of the above mentioned methods which left his patron's rights unaffected. He was thus worse off than if he had remained a Latin, for he could not put himself into such a position that his children should succeed to him. Hadrian allowed such a person to proceed as if he had still been a Latin.

The existence in the community of such different degrees of civil status not necessarily marked by any difference of race or language, led to errors of status and to the prominence of rules to remedy the legal disadvantages resulting from them. The case of errors of status in marriage was dealt with by *senatusconsulta*². Where persons married intending to satisfy the rules of *anniculi probatio*, but owing to mistake of status did not satisfy them, and had a child a year old, on proof of the error and that it was reasonable, they could proceed under the rules of *anniculi probatio* (*erroris causae probatio*). Where a person married in error one who had not *conubium* thinking wrongly either that he had not *conubium* or that the other party had, he could apply on the birth of a child shewing the facts, when *civitas* would be given to such of the

¹ G. I. 29; U. 3. 3.

² G. I. 67 sqq.

parties as were not *cives*, and *patria potestas* to the father. There were some restrictions: a peregrine shewing cause would get *civitas*, but not *potestas* over existing children except by special decree. And if either party was in fact a *dediticius*, he or she would take no personal benefit from the rules, though, as to the other parties, the ordinary effect would be produced.

There were no standing rules by which an ordinary peregrine could acquire *civitas*, apart from these cases of error. It was, as we have seen, frequently conferred on communities as a whole, and it was also given individually as a reward for military service, and as a qualification for service in the *legiones*, which was confined to *cives*. But a peregrine who so gained *civitas* for himself and his children did not get *patria potestas* over existing children unless he petitioned and it was for the benefit of the children themselves that he should.

For the understanding of some of these rules it is necessary to know on what principles the status of a child was determined. The general rule of *ius gentium* was that a child took the status of the mother, but the civil law had a different rule. A child born in Roman marriage took the status of its father, which would usually be *civitas*, but not always. For some peregrines had *conubium*, so that their marriage with, e.g., a Roman woman would be civil: in such a case the child of the peregrine father would by this rule be a peregrine. This did not apply to the marriage of *Latinus* and *civis Romana* under the *l. Aelia Sentia*. Such a marriage, though legally regulated, was not civil, and the child would be a *civis*. A *l. Minicia* provided that where either party to a marriage was a peregrine the child was a peregrine. In the exceptional case where there was *conubium*, and the father was a peregrine, and in any case where the mother was a peregrine, without *conubium*, this result would follow from ordinary principle. It was in the case where there was no *conubium* and the father was a peregrine and the mother a *civis* that the *l. Minicia* operated.

Children conceived in civil marriage took the father's status at the time of conception: in other cases the time of birth was looked at. But, as we have seen, in later classical law the child of an *ancilla* had the best status the mother had had at any time during gestation, and it is probable that this rule applied to other cases later on.

All this law was profoundly altered by a decree of Caracalla, which in A.D. 212 gave *civitas* to all the Roman world¹. The purpose, we are told, was fiscal, to widen the incidence of taxes on manumissions and inheritances which fell only on *cives*. But the document itself, of which we have an imperfect Greek rendering, suggests other reasons, to end a cause of frequent disputes, and to encourage the cult of the Roman gods. As stated by Roman writers the decree seems to make most of the foregoing rules obsolete, except in the case of slaves, to which it had no application. But in fact its scope was not so wide as it seems. In the first place it did not apply to *dediticii*, and though in the central part of the Empire, these were disappearing, there is evidence that at least in Egypt, and perhaps in some other parts of the Empire, the mass of the rural population were classed as *dediticii*. Moreover the decree did not abolish the inferior grades: it merely gave *civitas* to the present members and their descendants. All existing colonary Latins became *cives* and as no more Latin colonies were founded this class disappeared for ever. All Junian Latins became *cives*, but this class would recur, for slaves afterwards freed informally, or under thirty, or by a praetorian owner, would be Junian Latins. And in fact some other sources of Latinity, reward or penalty, appeared in later times. The epithet Junian died out: we hear only of Latins. There were also *deportati*, persons deprived of their *civitas* as a punishment for crime, a punishment which had superseded the ancient *aquae et ignis interdictio*. Their property was usually forfeited, so that their debts lapsed, so far as they were concerned, the estate being liable. They were members of no community at all, so that, e.g., they could neither take under a will nor make one.

Justinian took a more fundamental step²: he did away with all the inferior grades themselves. *Dediticii* had, it seems, disappeared, but he abolished the status itself *pro forma*. All free subjects were to be *cives*. The result was that the only peregrines left were foreigners, barbarians on the frontiers who were much like *dediticii*, and the *deportati*.

¹ D. I. 5. 17.

² C. 7. 6. 1.

CHAPTER IV

PERSONS: THE FAMILY. PERSONS *ALIENI IURIS*

22. Of the three notions on which we have based the discussion of Persons, that of *Familia* is the most important. In modern law we think of rights and duties as attaching to individuals, but that is a mark of a developed civilisation. In primitive Rome, the right and duty bearing unit, for private law, was the *gens*: with matters internal to the *gens* the other members of the community had little concern. This phase was ended before trustworthy history begins, so that little more than conjecture is possible as to the working of the system. In historic times the unit is the family, consisting of the *paterfamilias* and the subordinate members of the household. All rights, however acquired, vest in the *paterfamilias*, and, within the field of private law, all liabilities, however created, by act or undertaking of himself or a subordinate, are directly enforceable, so far as they are enforceable at all, against him alone. We shall see later¹ that so far as wrongs committed by a subordinate are concerned, the liability could be avoided by handing over the delinquent—the *paterfamilias* had the choice of surrendering him (*noxae deditio*) or ransoming him by paying the damages. Agreements by a subordinate did not, at civil law, bind the *paterfamilias* at all: it was only the praetorian reforms which made him liable to a limited extent which we shall later consider in detail. It is possible to think of the *paterfamilias* as “representing” the family, or as administrator of the family property. It may be that something of this kind, not clearly defined, for legal relations are only vaguely conceived in nascent civilisations, was the view of early law, but in historical times the *paterfamilias* appears as personally liable and entitled, subject to some restrictions on his power of disposal of the property by will. This picture of the subordinate member of the family, the *filiusfamilias*, as without property or other rights is not quite correct for classical and later law: certain acquisitions of a *filiusfamilias*, e.g., *peculium castrense*, he holds as his own as if he were a *paterfamilias*, and in some circumstances a *filiusfamilias* could bring an action at law. But these exceptions

¹ *Post*, § 132.

do not affect the general truth of the above description for classical law though, by the time of Justinian, as we shall shortly see, the *filiusfamilias* has attained a considerable degree of economic independence.

It should be noted that the word *familia* has many other meanings. Thus in the XII Tables it is used to denote the heritable property of a man, treated as a unit (*agnatus proximus familiam habeto*). Less commonly it is used to denote the body of slaves and other employees engaged in a particular business (*familia publicani*), and occasionally, as sometimes it is with us, to denote a group of relatives, wider than the legal family—in practice, the agnatic group, which is important in many parts of the law, or a section of it. A wider group still is the *gens*, of great importance in early law though its importance was gone in classical times. This consisted of all those who bore the same *nomen*, the gentile name. It thus consisted, usually, of a number of agnatic groups, who were supposed to be related.

Every male *civis* not under a *paterfamilias* is himself a *paterfamilias*, whatever his age and whether he has children or not. It follows that on the death of a *paterfamilias* with sons, each of these sons becomes a *paterfamilias* and if there are children of these sons the control over them (*patria potestas*), which was in the *paterfamilias*, passes to the individual fathers. *Patresfamilias* are said to be *sui iuris* while subordinate members of a family are *alieni iuris*. On the death of the *paterfamilias*, his daughters who were in his *familia* became *sui iuris*, but as women cannot have *patria potestas* there was no question of their becoming heads of families with subordinate members: *mulier et caput et finis familiae suae est*. A woman's children, born of a Roman marriage, were in the *potestas* of their father, or, if he were a *filiusfamilias*, in that of his *paterfamilias*. If not the issue of a Roman marriage they were *sui iuris* from birth. In classical law, the wife of the *paterfamilias* was not normally a member of the *familia* in the legal sense, though her children were. But if the marriage had been contracted in one of the ancient forms, *confarreatio* or *coemptio* (*usus* was early obsolete), the wife passed into the family of her husband, *in loco filiae*, the wife of a son so married being *in loco neptis*. Such a wife was said to be *in manu*, the relation being much the same as that involved in *potestas*. Apart from *manus* the wife

underwent no change of family and would be *sui iuris*, or a *fili-familias* to her own father, precisely as she had been before the marriage. It follows from what has been said that the children of a daughter were not in the *familia*. If she married with *manus* she passed into a new family, but, whether she married in this way or by ordinary informal marriage, her children were in the husband's *familia*, though, in the second case, she herself was not.

One further element in the *familia* must be stated. In early law (the institution survives into classical law for some purposes) it was possible for a *paterfamilias* to sell a *filiusfamilias* to another *paterfamilias* as a bondsman. One so sold was said to be *in mancipio* or *in causa mancipii*. Thus a complete *familia* in the classical law might consist of the *paterfamilias*, *fili(i)ae* *familias*, the wife *in manu*, persons *in mancipio* and slaves. The last we have already considered. With regard to the others we have now to consider the nature of the relation, its effects, and the ways in which it might arise and determine. We are concerned at present not so much with the *paterfamilias*, who is the normal unit to whom all law applies, as with the subordinates. We shall later consider the *paterfamilias* who by reason of youth, insanity or other cause, is under special rules.

Filifamilias. The main factor in their position was the *patria potestas*, a power so great and so enduring, for it was not ended by maturity of the *filiusfamilias*, that it was sometimes called *patria maiestas*. While in early law it was practically unrestricted, though it was usual to have the approval of a council of near relatives before inflicting any severe punishment, its history is one of progressive limitation on the father's rights. The chief elements in the *patria potestas* were:

Power of life and death. By the end of the classical age it was criminal in the *paterfamilias* to kill a *filiusfamilias*, even with the judgment of a family council: the offender must be brought before an ordinary criminal court. There was further restrictive legislation and by Justinian's time the *paterfamilias* was limited to reasonable castigation. In early law a child was not a member of the *familia* unless accepted by the *paterfamilias* but this was obsolete in the Empire, though the right of "exposing" young children was not abolished till late in the fourth century.

Power of Sale. As a practical part of the law, sale into slavery

or bondage belongs to early times. Except for surrender for a delict (*noxae deditio*) and for certain formal purposes, it was practically obsolete in classical law, but noxal surrender of male issue and formal sales for the purpose of adoption and emancipation¹ disappeared only under Justinian.

Right to all acquisitions of any kind. There was at civil law no corresponding liability on his undertakings, but the Praetor provided a scheme of remedies for such things². For wrongs committed by the *filius* the *paterfamilias* had the right of noxal surrender instead of paying the damages till Justinian abolished this system. By that time the *filius* had long been capable of ownership of certain funds (*peculium castrense* and *quasi-castrense*) in regard to which he was treated as a *paterfamilias* and could be personally sued. In the same way, wrongs to the son or to property in his hands were wrongs to the *pater*, except so far as they concerned those funds of which the *filius* himself was owner. Further, the *filius* himself was, in a sense, the property of the *paterfamilias* who had remedies of various kinds if he was taken away.

There were various rights of control over his acts in matters affecting the family and the family property. The right in early law to compel him to marry without reference to his own consent had become, in classical law, a right of veto on his marriage. There was a right to divorce him which seems to have survived the classical age. There was a power to appoint guardians by will (*tutores*) and a power to appoint a *heres* to take the property of the child if, surviving the *paterfamilias*, and becoming *sui iuris* on the latter's death, he died too young to make a will for himself (*substitutio pupillaris*)³.

23. Of the ways in which *patria potestas* was acquired some have already been discussed, e.g., *erroris causae probatio* and *anniculi probatio*⁴. There remain for consideration: Birth *ex iustis nuptiis*, the normal case, Adoption and, in later law, Legitimation.

Birth *ex iustis nuptiis*. *Iustae nuptiae* is such a marriage as satisfies all the rules of civil law. Any marriage between two persons who had the capacity of civil marriage with each other (*conubium*) was necessarily *iustae nuptiae*, for if the union was defective in any other respect it was no marriage at all. On the

¹ *Post*, §§ 27, 28.

³ *Post*, § 69.

² *Post*, § 122.

⁴ *Ante*, § 21.

other hand, if there was no *conubium* between the parties it might still be a marriage *iure gentium* (*nuptiae*, *nuptiae non iustae*) the wife being *uxor non iusta*, the children *liberi non iusti*. Such a marriage, in which one party at least would not be a *civis*, did not produce *patria potestas* over children nor did it create the civil relation known as *Agnatio*, of which it is important to grasp the nature. *Agnati* are those who can trace relationship to each other by civil descents through males from a common ancestor unbroken by any *capitis deminutio*. It did not arise by birth except *ex iustis nuptiis*. On the other hand it might arise otherwise than by birth: one who entered a *familia* by *anniculi probatio* or adoption became at once an agnate of all the agnates of the *paterfamilias*. Thus it will be seen that a brother's daughter was an agnate, while a sister's son was not. *Cognatio* was simply blood relationship. If an agnatic tie which was purely artificial, e.g., created by adoption, was broken by *capitis deminutio*, e.g., by emancipation, there was no longer any cognation either. But if a child who had entered the family by *anniculi probatio* left it by *emancipatio*, the cognatic tie remained, for this had existed independently of the creation of *patria potestas*, as of course it did where a child born *ex iustis nuptiis* was emancipated. Birth from gentile marriage (*nuptiae non iustae*) set up only cognatic ties. It must be noted that there is no question here of a choice between two modes of marriage: if the parties are civilly qualified for it the marriage is necessarily civil.

The position of children apart, marriage without *manus* produced few important legal effects. The husband's home was the wife's. The wife sometimes, but not necessarily, took her husband's name. She shared his honorific titles, and took part in the worship of the household gods. But, in general, marriage had little effect on the legal position of the parties. In particular their properties remained distinct.

This independence of property, an expression of the freedom from legal regulation which was characteristic of marriage in classical law (*liberum matrimonium*), was to some extent modified by the institution of *Dos*¹. This was a fund provided by the wife or on her behalf as a capital contribution to the household expenses. It was the property of the husband, subject to a duty to account

¹ U. 6. *passim*.

for it at the end of the marriage. *Dos* though usual was not essential to a marriage. There was legislation, the history of which is disputed, requiring the *paterfamilias* to provide a *dos*, but its absence would not invalidate the marriage. *Dos* provided by a paternal ancestor was called *dos profectitia*; that provided by an outsider was *dos adventitia*, and where *dos* was given on the express terms that it was to be refunded at the end of the marriage it was called *dos receptitia*, and the ordinary rules as to the disposal of *dos* did not apply. Though the husband was owner, he was under a liability to account. He must act like a *bonus paterfamilias* and was responsible for losses resulting from failure to observe this standard. A *l. Iulia de adulteriis* prevented him from alienating Italic land of the *dos* without the wife's consent, or from pledging it even with her consent. Under Justinian this applied to all land, and the wife's consent would not justify sale. Apart from these prohibitions¹, the liabilities might be varied to almost any extent by agreement; and *pacta dotalia* creating such variations were very frequent. An important case was that of *dos aestimata*, where the *dos* was taken by the husband at an agreed value. Here the husband had to account for this value at the end of the marriage whatever had happened to the *dos* itself: all risks were on him. It was as if he had bought it².

At the end of the marriage *dos receptitia* was returnable to the giver. The destiny of other forms of *dos* depended on their nature and on the way in which the marriage ended, and there were historical changes. If it ended by death of the husband the wife took the *dos* as she did in case of divorce, except that if this was caused by the wife or her *paterfamilias*, without justification, the husband might keep a certain proportion, varying with the number of children, with further rights of retention in respect of certain forms of misconduct, these *retentiones* being alternative to independent actions for damages in respect of them. Justinian abolished the *retentiones*, leaving the actions, except that *de moribus*, which he suppressed. If the marriage ended by the wife's death *dos profectitia* went to the donor, if alive; the husband having certain rights of retention for children. If the donor was dead the husband took it, in classical law, as he did *dos adventitia* in any case. Under Justinian the wife's *heredes* took instead of the husband.

¹ G. 2. 63; In. 2. 8. pr. ² D. 23. 3. 10; C. 5. 12. 10.

The *dos* did not pass or revert *ipso facto* at the end of the marriage. It was the property of the husband. There was in classical law no such thing as a terminable ownership, and such exceptions as arose in later law did not affect this case. He was under an obligation to restore it. The action was the *actio rei uxoriae* and, till the second century, security could be required for the return. Sometimes there was an express agreement for return, made by *stipulatio*, and in that case an *actio ex stipulatu* was available. Justinian¹ abolished the *actio rei uxoriae* and allowed the *actio ex stipulatu* in all cases, the *stipulatio* being implied. But the *actio ex stipulatu* was *stricti iuris* while the *actio rei uxoriae* was *bonae fidei*. This involved some practical differences which will be dealt with later, and Justinian, after a somewhat illogical method, not unusual with him, enacted that in this case the *actio ex stipulatu* should have, at least for certain purposes, the character of a *bonae fidei iudicium*.

In the fifth century there developed in the East a corresponding provision by the husband—*donatio ante nuptias*². It belonged to the wife but was administered by the husband. It was the subject of a great deal of legislation, the general tendency of which was to make its rules the counterpart of those of *dos*, the wife's interest in the *donatio* at the end of the marriage, by divorce or by death of the husband, being the same as that of the husband in the *dos* on divorce or where he survived. Under Justinian it might be created after marriage, as *dos* might always have been. He made still closer the aequiparation of the rules with those of *dos*: it must be of the same amount and any special pacts must apply to both. For obvious reasons he changed its name to *donatio propter nuptias*. *Dos* and *donatio* were exceptions to a rule that there could be no gifts between husband and wife. This rule, designed to protect the interests of the weaker party, is a limitation on the principle of *liberum matrimonium* which we have seen evidenced by absence of legal rule and shall find again in the rules of divorce. But the questions which would arise as to the status of children made it highly important to determine the question, at bottom one of fact, whether in a given case there was or was not a Roman marriage.

24. The essentials of such a marriage were:

Form. There was no necessary ceremony: all that was needed

¹ In. 4. 6. 29.

² C. Th. 8. 12. 1; C. 5. 3. 1-5.

was *deductio in domum*, which literally means taking to the husband's house, but was in fact satisfied by entry on common life however this was effected. Thus if the wife came or was brought to the husband's house this sufficed, though the husband were at the moment away. In practice there was usually a ceremonial, sometimes very elaborate, with religious elements borrowed from the older marriage with *manus*. The ceremony served a practical purpose. It was essential that marriage be meant and not mere cohabitation and the ceremony shewed this intent, *affectio maritalis*. It was still better shewn by the creation of a *dos*, so that fathers often insisted on this, especially if there was a great difference of rank between the parties, which might otherwise have suggested a less honourable relation. Where the parties were of equal rank there was a presumption of *affectio maritalis*, and in late law there was always a favourable presumption, though it might be rebutted both by direct evidence and by circumstances.

Consent¹. The parties must consent, though it is probable that during the Republic this was immaterial in the case of one who was *alieni iuris*—that of the *paterfamilias* sufficed. It follows from the requirement of consent that the party must be capable of this, e.g., a lunatic could not validly marry. The consent of the *paterfamilias* was needed if a party was *alieni iuris*, and, in the case of the man, if he was a grandson whose father was in the *potestas* of the grandfather, the father too must consent, as otherwise in the normal course of things, issue of that marriage would be added to his *familia* without his consent. Where the consent of a parent was needed it must precede the marriage, i.e., though common life began before, there was no marriage till the consent was given: it did not operate by ratification.

The right of the parent to refuse assent was not absolute in classical law, though the state of the texts leaves it uncertain how far the limitation went. Under Justinian, the magistrate could, it seems, compel assent to a proposed marriage unless reason for refusal was shewn. There were cases in which consent was dispensed with, e.g., where the *paterfamilias* was a *captivus* or was untraceable, but in both these cases Justinian required the state of things to have lasted three years². The daughter of a lunatic could marry, but a son could do so only with consent of a magistrate, till Marcus

¹ D. 23. 2. *passim*.

² D. 23. 2. 9. 1.

Aurelius allowed marriage generally to children of *mente capti*. Justinian, settling a dispute, declared this to cover all cases of diseased mind, the difficulty having been that *furiosi* were capable of lucid intervals¹.

Age. The male must be fourteen, the female twelve, and if the parties lived together before they were both of sufficient age, there was no marriage till that age was reached. The age is merely evidence of physical capacity, and thus, if other facts negatived this, there was no marriage: a *castratus* could not marry and one whose development was retarded could not, in classical law, marry till it was complete. But under Justinian the age seems to have been conclusive on the latter point.

Conubium. Capacity of civil marriage. In general the capacity of civil marriage was confined to *cives*, but it was sometimes conferred specially on communities of Latins or peregrines or on individuals as a privilege. And where *civitas* was conferred on a peregrine for military service, the diploma sometimes authorised him to contract civil marriage with any woman he chose, on his discharge, so that he could marry a woman of his own tribe and in effect confer *conubium* on her. It was limited *conubium*, since it covered only marriage with him. This would not of itself give her *civitas*, but, on principles already stated, the children would be *cives* and in *potestas*.

Where two persons both had *conubium*, it would not follow that they could intermarry. The cases of this relative incapacity are based on a variety of considerations. For social reasons marriage was barred between *ingenui* and freed persons till the beginning of the Empire, and thereafter between those of senatorial rank and freed women or actresses, till Justinian abolished the prohibition in the case of the latter. There might be no marriage between Christian and Jew. A guardian or his son might not marry one who was or had been his ward or a provincial governor one who was domiciled in the province. In both these cases fiduciary considerations (i.e., the danger of abuse of power) play a part and in the second there is the desire to guard against the risk that the representative of Rome in the province might become too closely allied with provincial interests. The reasons for the rule account for a number of exceptions, especially in the case of the

¹ In. 1. 10. pr.; C. 5. 4. 25.

guardian. Thus the bar did not exist if the betrothal preceded the guardianship, or was with the consent of the woman's father, or the woman was twenty-six.

Still more important were the bars created by relationship and affinity¹.

Blood relationship. It was indifferent whether the relationship was agnatic or cognatic. In the early Republic marriage appears not to have been allowed within the seventh degree, these being reckoned up to the common ancestor and down again, so that, e.g., first cousins were in the fourth degree, second cousins in the sixth, uncle and niece in the third. To about the end of the Republic marriage between first cousins was forbidden, but, apart from a temporary revival of this rule in the fourth century, the rule in the Empire was less severe. Ascendant and descendant could not intermarry and collaterals could not where one of them was only one degree from the common ancestor. Claudius, for personal reasons, allowed marriage with a brother's daughter, but the old rule was restored early in the third century.

Adoptive relationship. The rule was the same except that as between collaterals the bar ceased if the adoptive tie ceased. Thus, though an adoptive son could not marry his adoptor's daughter, he could do so if he was emancipated, as there was no longer any legal tie, and there had never been any blood tie. So, too, the bar applied only to the adopted person himself, not to members of his former family: there was nothing to prevent marriage between his present brother and his former sister.

Affinitas. Connexion by marriage. One party to a marriage might not afterwards marry an ascendant or descendant of the other, or, in later law, a brother or sister in law. Nor might one marry a person who had been betrothed to one's parent or child. There were other analogous rules.

In all these cases a union conflicting with the rules was void: in some it was punishable and in those under the rules as to relationship and the like it was treated as incestuous.

25. The independence which was so marked a feature of the conception of marriage in classical law finds its most striking expression in the law of divorce. The power of the *paterfamilias* to end the marriage of a member of his *familia*, by divorce, continued

¹ G. I. 58-63; In. I. 10. 1-11.

unrestricted to the end of the classical age, and, with the restriction that there must be *magna causa*¹, under Justinian. The more familiar notion of divorce by the act of the parties themselves is very prominent in the classical law. It was one of the most notable characteristics of that age that the marriage tie was anything but sacred. No doubt if we took the satirists literally we should get an exaggerated view, but the legal rules themselves give a sufficiently depressing picture. It was an inevitable part of the conception of *liberum matrimonium* that divorce by mutual consent should be unrestricted, and it so remained in classical and later times, except for a short time under Justinian. But the facilities went much further. Either party (subject to restrictions on a *liberta* married to her patron) could divorce the other by a formal *libellus repudii* sealed by seven witnesses, without assignment of any reason. But though this unrestricted power of *repudium* was not abolished it might be penalised and there was a progressive development of penalties for causeless divorce. During the Republic there was a *nota censoria*, and we have already mentioned the right of retention of part of the *dos*. When the Empire became Christian there was a great sharpening of these penalties, which might amount even to deportation and forfeiture of *dos*. Justinian² established a number of justifications for divorce, and provided that in the absence of any of these the divorcing husband should be subject to heavy money penalties, the divorcing wife confined in a nunnery for life and her property forfeited. But, however penalised, the divorce was valid.

The state of things here described is in strong contrast with the view of marriage taken by the writers of the Republic. There had indeed been a great change of manners. But it is hardly less out of harmony with the language (*ubi tu Gaius ego Gaia*) and ritual of the ceremony of marriage still in use in the classical age, religious in character, and expressing a community of interests and permanency of the relation created, with which these rules obviously clash. The old view is expressed in the definition of marriage given at the close of the classical age by Modestinus: "*nuptiae sunt coniunctio maris et foeminae et consortium omnis vitae divini et humani iuris communicatio*," a definition accepted by Justinian, who, as we have seen, made commendable efforts to restore the earlier

¹ C. 5. 17. 5.

² C. 5. 17. 10, 11.

state of things. The truth is that these forms and even this late definition are survivals from the old system of marriage with *manus* which we shall shortly consider. In that system the notion of *liberum matrimonium* played little or no part, and the *divini et humani iuris communicatio* was better represented, though, as might be expected, it took the form of merger of the wife's personality in the husband's.

Apart from divorce marriage ended by the death of either party, and, no doubt, this was still the most usual termination. It ended also by enslavement, for there could be no marriage of a slave, and therefore by captivity with the enemy. But the equivocal position of the *captivus* and the reflection of this in the rules under Justinian as to the effect of captivity on marriage have already been pointed out. Loss of citizenship, e.g., by *deportatio*, did not end marriage, but it changed *iustae nuptiae* into *non iustae*, for a *deportatus* has no *conubium*. Such a marriage has no civil effects, and thus, though the parties continue to live together, children will not be in *potestas*, and any *dos* ceases to exist as such and can be reclaimed as on death. *Relegatio*, a minor form of banishment, did not affect *civitas* and thus did not change the character of the marriage.

26. *MANUS*. So far as the position of children is concerned, the effect of marriage with *manus* is the same as that of the ordinary marriage of classical law, and the matter would more logically be treated after *potestas* has been dealt with, as creating the similar position of *manus*. But convenience suggests the treatment of it as part of the subject of marriage generally. It is probable that in very early times all marriage was with *manus*, *usus*, which we know as creative of *manus*, being originally merely a rule that an informal union, followed by a year's cohabitation, became *ipso facto* a marriage, with the wife *in manu*. But by the time of the XII Tables the rule of *trinoctium abesse* is held to shew that there could be marriage without *manus*, though it can obviously be otherwise interpreted. By the end of the Republic *manus* was unusual, and though it still nominally existed in the time of Gaius, it seems to have disappeared altogether about the end of the second century.

The main effect of marriage with *manus* was that the wife was *in loco filiae*, or, where the husband was a *filius*, *in loco neptis*. She ranked as a sister to her own children. But her position was not

exactly that of a child. The rules of *emancipatio* did not apply: divorce was the means of voluntary determination. Where the woman was *alieni iuris* she had no property to take with her into the new family, but, as in later law, the father commonly provided a *dos*. Where she was *sui iuris* her property passed to the husband, not absolutely as it did on adoption of a person *sui iuris* in classical law, but as a *dos*. It is improbable that she could be given in adoption or sold into civil bondage, except, as we shall soon see, for formal purposes. And, *de facto*, she was head of the household, managing domestic affairs and controlling her children and the slaves, as a sharer of the power of the *paterfamilias*.

Manus could be acquired in three ways:

*Confarreatio*¹. This was a religious ceremony at the altar of Jupiter before the *pontifex maximus* and the *flamen Dialis*. There were ten witnesses who may have represented the ten *curiae* forming one of the three traditional tribes of which the people was constituted (*Ramnes, Tities, Luceres*). A sacrifice was offered by the priests and there was a further ritual involving the consumption of a cake of *far*, from which the process took its name. This process, which had its origin in the old patrician organisation of the community, remained important to the end of the Republic, since the holders of some high priestly offices must themselves be parties to, and issue of, confarreate marriage. But, as *manus* had become unpopular, Tiberius found it necessary to provide that marriage to a *flamen Dialis* should create *manus* only *quoad sacra*, i.e., should not create it at all for ordinary purposes. Whether this applied to all marriage by *confarreatio*, or whether indeed this still existed in any other case, is uncertain: in any case it had lost all importance in the Empire.

Coemptio. This is a process developed from bride purchase which is found in most primitive communities. As we know it, the wife sells herself to the husband by a formal process *per aes et libram*, which was the appropriate method of transfer of some forms of property. But in two important points *coemptio* differs from the ordinary transfer of property. The woman sells herself with the authorisation of her *paterfamilias*, or, if she is *sui iuris*, of her tutor, for, even in classical law (apart from the *ius liberorum*), women of any age, *sui iuris*, were under guardianship. And the

¹ G. I. 112; U. 9.

words used in the ceremony are carefully varied from those used in *mancipatio* of property, so as not to treat the woman as a *res*. It is generally held that this is not the primitive state of things; that at one time she was actually sold by the *paterfamilias*, perhaps for a real price, and the words used may then have been different. *Coemptio* is a secular process: it may have been the plebeian form of marriage, accepted by patricians also after the incorporation of the plebeians into the community, and it seems to have been the only practical mode of creation of *manus* in the Empire. But it had by this time come to be employed, as *coemptio fiduciae causa*, or *coemptio fiduciaria*, for purposes other than marriage. Gaius¹ mentions two applications of this. A woman *sui iuris* of any age was under guardianship (*tutela*) and her statutory guardians (*tutores legitimi*) had large powers of control over all her dealings with important property. This had its inconveniences for both, since it involved cooperation of the tutor in all the woman's dealings. Accordingly it might be arranged that she, with the tutor's consent, should coempt herself to someone, not *matrimonii causa*, but in order that he might manumit her into formal bondage to someone else under a trust (*fiducia*) to manumit her. After the manumission he would be her tutor (*tutor fiduciarius*) having no real power over her and thus no responsibility. The *coemptio* was *dicis causa* and gave no rights, and the *coemptionator* might be compelled to carry out the sale and the buyer to free her. But she must not coempt herself to her own husband for this purpose: if she did true *manus* was set up. The same process was applied to meet another difficulty. An *ingenua* could not make a will even with her tutor's consent unless she had suffered *capitis deminutio*. The *coemptio* caused a *capitis deminutio*. But this application of it became unnecessary when Hadrian allowed women in *legitima tutela* to make wills with the consent of their tutors. These artificial applications of *coemptio* are as old as Cicero who gives what seems to be a third case, the application of the same process for the purpose of putting an end to the *sacra* of a family.

Usus. This was a rule that a year's cohabitation under marriage without *manus* would create this relation. But, so early as the XII Tables, a way had been found of avoiding this result, the "*trinoctium abesse*"². This was a rule that *manus* would not arise

¹ G. I. II 5.

² G. I. III.

by *usus* if the wife was absent from the husband's house, intentionally and with this aim, for three nights (apparently successive) in each year. There is controversy as to the relative age of these modes of creation of *manus* but it is quite clear that *usus* was the first to disappear. Gaius speaks of it as obsolete, partly as the result of legislation and partly by desuetude.

The conditions of divorce from *manus*, in which there was a definite change of family position, a *capitis deminutio*, were very different from those of the simpler marriage which involved no such change. It may be that at one time there was no divorce at all from *confarreate* marriage. There never was for the marriage of actual *flamines*, where, however, there is evidence of a specially elaborate religious ceremony, but in historical times there was, for other cases, a process called *diffarreatio*, in which, following a method characteristic of the Roman Law, the act dissolving the relation follows closely the forms in which it was created. In *manus* created by *coemptio* or *usus* the form was similar to that employed in emancipating a daughter. It is uncertain whether the wife could compel a divorce from *manus*. If the change made by Tiberius applied to all *confarreate* marriage, it is likely that after his change mere *repudium* sufficed in this case—if indeed such marriages occurred.

27. ADOPTION¹. This institution, i.e., the voluntary introduction into the family, with the legal status of a child, of a person not necessarily related to the adopter, is not known in our law, though it has been preserved in the French Code Civil, and even, though with great modification, in the German Bürgerliches Gesetzbuch. In Roman Law it is so prominent that it must have been usual. It appears in two forms: *Adrogatio*, the adoption of one who was *sui iuris* before, a *paterfamilias*, and *Adoptio* in a narrow sense, the adoption of a *filiusfamilias*, the transfer of a *filiusfamilias* from one family to another. Of these *adrogatio* is no doubt the older. It is probably older than the XII Tables. It is not indeed mentioned in the extant fragments, but it was effected before the *Comitia Curiata*, and the extant fragments contain no mention of the activities of that body. As the effect of the transaction must be to extinguish a family and might be to extinguish a *gens*, of whom the *adrogatus* might be the sole representative, it was put under

¹ G. I. 97-107; In. I. 11.

severe restrictions. It was allowed only to preserve a family from extinction and only with the approval of the religious authorities. Its purpose and its dangers explain its special rules. It must not however be forgotten that it often served to render legitimate a child of the adrogator born out of wedlock. Thus a man might free and adrogate his child by a slave woman: a freedman might buy, free and adrogate, his child born in slavery.

The first step in the process was an enquiry by the pontiffs into the permissibility and desirability of the transaction in the particular case, i.e., the need from the adrogator's point of view, the desirability from that of the *adrogatus*. It was no doubt out of these enquiries that the settled rules arose as we know them. Probably at no time were they absolutely rigid. If the pontiffs were satisfied the matter went before the *Comitia Curiata*, the body which specially represented the community regarded as a group of *gentes* and families. For this purpose the *Comitia* was summoned in a special manner (*Comitia calata*) and probably presided over by a pontiff. The parties were then asked if they consented (*rogati*) and there was then a *rogatio* of the people (*rogatio* is the technical term for the submission of a question to the popular vote), on the question whether it should be allowed. There may then have been a solemn renunciation of the *sacra* of the old family, but it is not certain that this process was applied here, indeed the meaning of the expression *detestatio sacrorum* is disputed. We have seen that the *Comitia Curiata* fell early into decay. But its part was in historical times merely formal: it was the pontifical approval which practically settled the matter. After the *Comitia* was really obsolete it continued to be represented for this purpose by thirty lictors, supposed to represent the thirty *Curiae*, with the augurs to see to the auspices. This lasted till Diocletian, who substituted imperial rescript, a logical step by which the actual legislative authority took the place of one long since extinct.

Besides the rules common to all adoption there were some peculiar to *adrogatio*, explained by its character and purpose. So long as it was a comitial act it could be done only at Rome and a woman could not be adrogated, for the *Comitia* sat at Rome and a woman could not appear in it. Both restrictions disappeared when it was done by rescript, but a woman was rarely adrogated,

since she could have no *sui heredes* and thus the *familia* would not be perpetuated. An *impubes* could not be adrogated in early law: it was a dangerous power to put in the hands of his tutor. But Antoninus Pius allowed it¹, subject to specially careful investigation, and the *auctoritas* of the tutor or tutors, security being taken for the restoration of the property of the *adrogatus*, if he died still *impubes*, to those who would have taken it apart from the adrogation. If the *adrogatus* was emancipated while *impubes* his property must be restored at once. If he was disinherited, it could be claimed at the death of the adrogator. In this case, and if the emancipation was without cause approved by a court, the *adrogatus* so dealt with was also entitled to one fourth of the property of the adrogator (*quarta Antonina*). It is probable that these obligations also were covered by security. The security was given to a public slave—in later law to a *tabularius*, a freeman—and the persons concerned were allowed to sue upon his contract. But these securities and provisions were nullified by the arrival of puberty. The *adrogatio* could then be set aside for good cause by a forced *emancipatio*, but, subject to this, it was as if the *adrogatio* had been after puberty.

No one could adrogate who had a child, or was under sixty, unless from some cause he was unlikely to have children. Nor was *adrogatio* allowed unless there were surviving relatives of the *adrogatus* to attend to the *sacra* of his ancestors, a rule obsolete in later law. A guardian might not adrogate one who had been his ward. A *libertinus* might not be adrogated by anyone but his patron. But the application of these rules depended on the officials who conducted the preliminary enquiry: it is clear that they were not always observed, and an *adrogatio* once carried through was valid even though it infringed them². A lunatic could not be adrogated as he could not consent. A deaf or dumb person could not: he could not take part in the forms.

If the *adrogatus* had children these passed with him into the family of the adrogator. Not only did the property pass to the adrogator (subject to a serious restriction in the later Empire affecting these like other *bona adventitia* of a *filiusfamilias*, to be considered later) but as *adrogatio* involved *capitis deminutio*, a change of personality, all obligations of the *adrogatus*, except those

¹ G. 1. 102; Ulp. 8. 5.

² D. 38. 2. 49.

resulting from delict, ceased to bind him at strict law. How the obvious injustice to his creditors was met will be considered in connexion with the law of universal succession¹.

Besides these rules special to *adrogatio*, there were restrictions common to all adoption. No one could adopt who was physically incapable of marriage. There must be such a difference of age that the adopter might be the father, a difference fixed by Justinian at eighteen years, *plena pubertas*, the latest age at which maturity could be expected. Women could not adopt in classical law, but later, a woman who had lost her children might adopt in either mode as a consolation, the adoption giving rights of succession, but, of course, not *potestas*. There could be no condition on either form of adoption.

28. *ADOPTIO*, the adoption of a *filiusfamilias*. As this did not affect the existence of a family or of its *sacra*, it was not directly under public control, but depended on consent of the parties. It is, presumably, considerably later than the XII Tables, since the form used is based on an ingenious perversion of a rule in that code, the notion being probably due to the pontiffs. The XII Tables provided that if a father sold his son (i.e., into civil bondage) three times, which was possible, since, as we shall see, bondage was terminable, the son was free from the *potestas*. The process devised began with a sale of the son. The buyer manumitted and the son reverted to *potestas*. These steps were repeated. Then followed a third sale which destroyed the *potestas*. The adopter now brought a collusive action against the buyer claiming that the person to be adopted was his son, and judgment was given accordingly. In the case of a daughter or grandchild the pontiffs, by an illogical inference from the use of the word "*filius*" in the XII Tables, held that one sale sufficed. The logical inference would have been that it could not be done at all in such cases, as, apart from this rule, *potestas* was indestructible. The sale or transfer, which was by *mancipatio*, was fiduciary and the magistrate would, if necessary, compel the buyer to complete the *manumissio*. It will be seen that the process has two parts—the three sales needed to destroy the *potestas* and the collusive action which was the real act of adoption, involving the intervention of the public authority, which is however merely formal. In later law the formal sales were

¹ *Post*, § 83.

recognised as useless: indeed it is possible that in practice they were neglected. Justinian suppressed them altogether and substituted for the collusive action an appearance before the magistrate and entry of the transaction on the records (*acta*) of the court. In early law there is no reason to suppose the consent of the *adoptatus* necessary: it is possible that it was not required in classical law, but under Justinian he must at least not *contradicere*.

A person might be adopted as a grandson, and, with the consent of any son, attached to him as a son, becoming a *suus heres* to him and not to the grandfather. An adoptive child emancipated or given in adoption could not be readopted, though one's own child given in adoption might be. Such a readoption did not undo the *capitis deminutio* which had occurred—the *adoptatus* did not again become the father of any child he might have left in the family: he was a new person. An adoptive child emancipated lost all connexion with his adoptive family; he became an *emancipatus* of the family to which he had originally belonged. As this might, in conceivable circumstances, leave him with no rights of succession at all, Justinian fundamentally altered the law as to the effect of *adoptio*¹. In ordinary cases an adoptive child was to retain his rights of succession in the old family and acquire a right of succession on intestacy in the new, but he did not pass into his adoptive father's *potestas*, and had no ground of complaint if the adoptive father disinherited him. This Justinian called "*adoptio minus plena*." But he allowed the old law to apply where the adopter was a natural ascendant, as here there was not the same risk of capricious emancipation, and, on rather technical grounds, where a grandchild was given in adoption in his father's life. But here, if the father died before the grandfather, so that he would have been a *suus heres*, but for the *adoptio*, this at once became *minus plena*.

Justinian tells us that Cato held that owners could adopt their slaves; and elsewhere we are told that they might give their slaves in adoption. Both these institutions have gone from the classical law and we do not know with certainty how they were effected. Both results could, however, be reached by *manumissio*, followed by *adrogatio*.

Another special case of adoption, common in Greek law, indeed

¹ In. I. II. 2; C. 8. 47. 10.

in that law the only way of practically appointing a *heres*, was adoption by Will. No Roman legal text mentions it, but there are many recorded cases of it in literary texts, all of them very late in the Republic or very early in the Empire. Little is known of these adoptions. It has been doubted whether they were anything more than *institutiones* as *heres*, with a direction to take the testator's name, in which case they would have no effect on the agnatic position of the person concerned.

29. *LEGITIMATIO*. This is a method of introducing into the family children born out of wedlock. Not all such children could be so dealt with, but only those born of *concubinatus* (*liberi naturales*). This was a union which, though it was not marriage, was so far recognised that the parties to it were not guilty of *stuprum*. Its first introduction seems to have been in the case of soldiers, who were forbidden to marry while on service, but by the second century it was general, the woman being usually of lower rank than the man. In general it was not allowed except where *matrimonium iuris gentium*, at least, was possible between the parties, and it was subject to many rules similar to those of marriage. A man could not have a wife and a *concubina* or two *concubinae*, any more than he could have two wives. There must be marriageable age. Relationship barred, as it did marriage. It was not always easy to tell whether the union intended was marriage or concubinage. We have already considered the usual evidences and presumptions¹.

Children of such a union were not related to the father and his relatives, except for the purpose of the bar to marriage, but they were cognates of the mother, and were her *liberi* for the purpose of the *ius trium liberorum*, a privilege giving exemptions with which we shall deal later. Apart from some special rules affecting *milites*, there was no power of *legitimatio* till the Empire became Christian. Several methods were then provided.

Subsequent marriage. Constantine early in the fourth century, and Zeno late in the fifth, provided, in each case only for existing, not for future unions, that marriage of the *concubina* should legitimate the children, if they consented, subject to some restrictions of which the most important was that there must be no legitimate children. After varying legislation Justinian allowed it generally, under similar conditions, even if there were legitimate children.

¹ *Ante*, § 24.

Oblatio curiae. As one of various devices for maintaining the numbers of the *decuriones*, members of a local administrative council (*curia*), the office being unpopular on account of the burdens it involved, it was provided in A.D. 443 that one without legitimate children might enable his child by a *concubina* to inherit from him by entering a son as a *decurio*, or by marrying a daughter to a *decurio*. This did not create agnation or *potestas*. Justinian¹ made it create *potestas*, but not agnation with his relatives, and permitted it even where there were legitimate children.

*Rescriptum principis*². Justinian provided that on petition, either *inter vivos* or by will, shewing that there were no legitimate children, and that the *concubina* was dead or unworthy of marriage, a rescript of full *legitimatio* might issue.

Revocatio in patriam potestatem, originating by legislation under Constantine, and operative under Justinian, by which an emancipated son who had proved ungrateful could be recalled to *potestas* under magisterial decree, may be regarded as another mode of creation of *patria potestas*.

The lengthy account of these artificial modes of creation of *patria potestas*, inevitable by reason of the elaborate forms of some of them, may give a false impression as to their relative importance. No doubt adoption and the like were common, but at all times in Roman history, the great majority of Roman households contained only such *filiifamilias* as belonged to it by birth.

30. Determination of *patria potestas*. The death of the *paterfamilias* broke up the *familia* into as many *familiae* as there were sons, and daughters, and children of deceased sons. All these became *sui iuris*. Grandchildren by a son, who was still alive, passed into his *potestas* and became *sui heredes* to him, which they had not been to the grandfather. Enslavement of, and loss of *civitas* by, the *paterfamilias* had a like effect. Death of a *filiusfamilias* made his children *sui heredes* of their grandfather. Enslavement or *deportatio* of a *filiusfamilias* ended the *potestas* and broke the agnatic tie between him and the rest of the family but did not affect the similar tie between his children and the rest of the family. Transfer by *adoptio* had similar effects, subject to Justinian's changes. *Adrogatio* of a *paterfamilias* transferred the *potestas* over his children to the adrogator. Even *anniculi probatio* and *erroris*

¹ In. 1. 10. 13; C. 5. 27. 9.

² Nov. 74.

causae probatio might produce a transfer of *patria potestas*, for the person so brought into *potestas* might have been adult and a father when the matter was brought up. The sale of a son into civil bondage ended the *potestas* but, as we have seen, this was not necessarily final: in certain conditions the *filius* would relapse into the *potestas* and the old agnatic relations. There were some other cases in which the *potestas* was ended with or without rupture of the agnatic ties, but the only one which we need consider is:

*Emancipatio*¹, voluntary release from *potestas*. To effect this it was necessary to resort to the device of triple sale to destroy the *potestas*. The process was precisely the same as in *adoptio*, up to and including the third sale. This destroyed the *potestas*. The next step might be either a manumission from the bondage by the buyer, or a sale back to the father, followed by a similar manumission by him. The former course made the *extraneus* buyer the quasi-patron with rights of succession and guardianship (*tutela fiduciaria*). The latter vested the quasi-patronate, with the right of succession which it involved, and the guardianship, in the actual father, and was for this reason more commonly adopted. It must be remembered that the question of guardianship would arise in the *emancipatio* of any female, in classical law, and in that of a male under fourteen.

There was some relaxation of the idle formality of the sales before Justinian. He, as in *adoptio*, abolished them altogether, substituting for the old process, as in that case, attendance of the parties before the court and registration of the transaction in the *acta*.

There were a few cases in which *emancipatio* could be compelled, e.g., that of *adrogatus impubes* already mentioned, but in general it was a voluntary act. In the case of a grandson the consent of the father was not needed. The consent of the *emancipatus* himself was not required in early law, or, perhaps, in classical law. But it was required in the fourth and fifth centuries, and under Justinian the unsatisfactory texts indicate that, as in *adoptio*, it was enough if he did not *contradicere*—silence gives consent. In the case of an *infans* consent was expressly dispensed with by Anastasius.

The emancipation of an adopted child was in effect a roundabout

¹ G. I. 132; In. I. 12. 6, 7.

process of emancipation by his original *paterfamilias*: all connexion between the *emancipatus* and his adoptive family was ended. The primary effect of an emancipation of a man's own child was to destroy the *potestas*, to make the *emancipatus sui iuris* and to destroy the agnatic, but not the cognatic, connexion between him and his old family group. Thus an *emancipatus*, so long as he remained *sui iuris*, could not possibly have any agnatic relations except his own descendants. In the state of things which existed in early law, cognatic ties meant very little, and it was practically a complete severance, so far as his rights were concerned, though as a result of the usual form of emancipation the former *paterfamilias* as quasi-patron had a right of succession. But, as time went on, especially under the influence of the changes made in the practical law of succession by the Praetor, the economic effect of emancipation became less and less. The *emancipatus* acquired, before the end of the Republic, rights of succession as great as if he had not been emancipated, as against his father's estate. It was long indeed before he acquired as good rights against other former relatives, for, even under praetorian rules, the right of succession of cognates was very remote, but, under Justinian he has very much the same rights of succession (and obligations of guardianship) in regard to the brothers and sisters as if he had not been emancipated. The dangers, therefore, which, as we noted, Justinian saw in capricious emancipation, which induced him to alter the law of adoption, seem rather unreal. But, in fact, as his explanation shews, he has in mind certain exceptional cases into which we need not go.

The name *emancipatio* expresses the main feature of the transaction, the release from *potestas*. But, in earlier law, as we have seen, this advantage of independence is gained only at the cost of sacrifice of many rights. Thus, in an age when the consent of the *filius* was not required, the process might operate as a punishment, ridding the *paterfamilias* of an unsatisfactory son. But there is little evidence that it was so used, and, in fact, the loss of succession was frequently met by a gift of money at the time of the *emancipatio*. Moreover, sons as well as slaves were usually allowed a *peculium*, and just as a slave freed *inter vivos* kept his *peculium* unless it was expressly reserved, so too a son on emancipation normally kept his *peculium*.

31. The remaining type of subordinate member of a *familia* is the person in civil bondage, *in mancipio*, *in mancipii causa*¹. Probably in very early times his position was indistinguishable from that of a slave except in its terminable character. As we saw in dealing with formal sales for the purpose of adoption, etc., the status was created by *mancipatio* of the *filiusfamilias* by the *paterfamilias*, a step involving loss of *patria potestas* and rupture of the agnatic tie: it was a *capitis deminutio*. There is no evidence that a *paterfamilias* could put himself into this position by self-sale. The institution belongs in practice to the Republican law. Gaius indeed speaks of it as an existing institution, but, in fact, it survived in his time only for the formal sales already mentioned and for *noxae deditio*, i.e., handing over a *filius* in place of paying damages for a wrong done by him. We know little of the rules except as described by Gaius when it was in decay, and it must be uncertain how far the rules as presented to us are identical with those in force when it was a real economic factor in Roman life. The main rules, as we know them, are the following. The bondsman was not a slave: he was still free and a *civis*, though his political rights were probably in abeyance. His marriage was unaffected. His children being, in the time of Gaius, in the *potestas* of his original *paterfamilias*, if the *paterfamilias* died, so that he would have been *sui iuris* but for the bondage, they passed into his own, though he could not exercise it for the time being. This institution creates difficulties of which we do not know the solution: in the Republic the children were probably *in mancipio* with him. As to acquisitions, contracts, delicts and the like, the bondsman was in much the same position as a slave, though in some respects more favourably treated, at least in the Empire. Thus, though like a slave he could not be made *heres* unless he was freed, he had, unlike a slave but like a son, the right of refusal (*ius abstinendi*). And for outrageous conduct to one *in mancipio* the holder was liable to the father, *fili nomine*, by an *actio iniuriarum*. These rules obviously do not constitute a coherent system. They represent the institution in a state of change and decadence.

The position might be ended by one of the modes of manumission appropriate to slaves, but the man became not *libertinus* but *ingenuus*, and the rule of the *ll. Aelia Sentia* and *Fufia Caninia*

¹ G. I. 116 sqq.; I. 138 sqq.

had no application. But Gaius tells us that the bondsman could end the relation at the arrival of the *Census*, usually every fifth year, without the holder's consent, by entering his name on the Census Roll. He adds that this does not apply in the formal sales for adoption and emancipation or in case of noxal surrender. These were in fact the only cases which survived in his time, and indeed the *Census* itself was obsolete. We learn from other sources that in late classical law one noxally surrendered into bondage was entitled to claim manumission so soon as his labour had compensated for the damage done¹.

It is convenient to summarise, by way of appendix, the rules as to the extent to which those in *potestas*, *manus* or bondage could, by their transactions, benefit or bind the *paterfamilias* or themselves.

What a *filius* acquired, either by transfer of property or by contract, vested in the *paterfamilias*; but a *filius* could not take part in the formal conveyance called *cessio in iure*, and the rights under a contract of *adstipulatio* did not so pass to the *pater*. Obligations undertaken by him did not bind the *pater*, at civil law, and they did so only imperfectly, as we shall see later, at praetorian law. They seem, however, to have bound the *filius* personally and thus he would be liable under them if he became *sui iuris* by the death of the *paterfamilias*. This would be manifestly unfair if the transaction was in the affairs of the *pater*, and the *filius* had not succeeded to him. And if he was emancipated, the *capitis deminutio* destroyed the liability, which, if he took his *peculium* with him, would be equally unfair to the creditor. The Edict dealt with the matter by a provision that if he was emancipated or disinherited, or refused his share in the *hereditas*, the Praetor would give an action against him, if enquiry shewed that this was reasonable, limited, however, to his means². It must be noted that none of this applied in the Empire to certain funds, *peculium castrense* and *quasi castrense*, with which we shall deal later³, as to which the son was treated in all respects as a *paterfamilias*, and that in the later Empire it applies only to a limited extent to property acquired otherwise than from the *paterfamilias* or in his affairs.

As to *filiaefamilias* the better view seems to be that so long as the perpetual *tutela* of women lasted, a woman *alieni iuris* could

¹ Coll. 2. 3.

² D. 14. 5. 2.

³ Post, § 63.

not bind herself, for she could hardly have more capacity than one *sui iuris*. But in the law of Justinian, she was, for this purpose, in the same position as a *filiusfamilias*. The same principles applied to a wife *in manu*, but this did not occur in later law. Both the *filia* and the wife *in manu* acquired for the *pater*, but as to the extent to which they could bind him at praetorian law we have no information.

Of the person *in mancipio* we are told that he was in the same position for these purposes as a slave: he could not bind himself, and thus no action could be brought against him after the relation had ceased, for transactions by him while *in mancipio*.

32. *CAPITIS DEMINUTIO*¹. In the foregoing account of the organisation of the family it has been pointed out that in some cases, e.g., death of the *paterfamilias*, *potestas* was ended and the family so to speak split up, without rupture of the ties connecting the surviving members of the household: the agnatic connexion was unbroken. In other cases, e.g. *emancipatio*, the agnatic tie was broken and a break of this kind was described as *capitis deminutio*. This notion of *capitis deminutio* is fundamental in the law of personal capacity and must be carefully considered.

As its name indicates this is a loss or lessening of civil capacity (*caput*). The account of the matter given by Gaius and substantially adopted by Justinian, representing therefore the classical and later law, may be put as follows. It is a change or destruction of personality caused by a change of status, itself produced not in the ordinary course of nature but by the operation of some act in the law, taking effect directly on the person in question. Not all changes of what may be called "status," so produced, were *capitis deminutiones*. A man did not suffer *capitis deminutio* by being removed from an office or declared *intestabilis*: only such a change as deprived him of liberty, *civitas* or family rights had this effect. Hence there were three degrees of *capitis deminutio*, *maxima* which was loss of liberty, as when a *civis* was enslaved, *media* or *minor*, which was loss of *civitas*, as when a *civis* was deported, and *minima*, loss of family rights, as when one was given in *adoptio*, or adrogated, or emancipated, or passed into *manus* or out of it, or was sold into bondage or released from it. In the first case all three branches of *caput* were lost. In the second *libertas* was retained but *civitas* and

¹ G. I. 159 sqq.; In. I. 16.

familia were lost. In the third only the family rights were lost, and these were, as a glance at the cases will shew, commonly replaced by a new set. In some cases indeed, e.g., *emancipatio*, the transfer is into a family group of which the person concerned is the sole member, but in it he is *sui iuris*—a *paterfamilias*. Thus *capitis deminutio minima* differs from the others in that they are definitely changes for the worse, while in this case it is sometimes a purely lateral change, as in *adoptio*, while in *emancipatio* it is in one sense a change for the better—a person *alieni iuris* becomes *sui iuris*. But there is always a loss of existing rights.

The chief effects attributed by the texts to *capitis deminutio* (some at least of which might perhaps better be attributed to the legal event of which the *capitis deminutio* is also a result) are the following.

Destruction of the agnatic tie and of any existing *patria potestas*. Though this effect remained throughout the history of the law it must be remembered that the steadily increasing recognition given to cognatic connexion (which was not affected by *c. d. minima* or *media*, though it was by *maxima*) much lessened the importance of it. In the final state of Justinian's law it was of no practical importance. In some of the cases, as we have noted, *potestas* was simply transferred, as in *adoptio*, or where an *adrogatus* had children or where a woman *alieni iuris* went into *manus*. Marriage was not ended except by *c. d. maxima*, though *media* would convert *iustae nuptiae* into *matrimonium iuris gentium*.

Destruction of life interests, e.g., usufruct. This was due to the conception of the *minutio* as destroying the old personality. Under Justinian this rule no longer applied to *c. d. minima*; indeed, in classical law, modes of creating these interests had been devised which practically evaded this rule.

Avoidance of any will. Here it is to be noted that in the Empire a *filiusfamilias* became capable of owning certain property as if he were a *paterfamilias* (*peculium castrense*, gains on military service, *p. quasi castrense*, gains in civil service, etc.), and, as to these, at least in later law, a will remained valid, notwithstanding any *capitis deminutio minima*.

Transfer of all assets, except such as were extinguished. Here too the *peculium castrense* and *p. quasi castrense* were not affected. The destination of the assets depended on the nature of the event

causing the *capitis deminutio*. In the case of the *filiusfamilias* (apart from *peculium castrense* and *p. quasi castrense*) there were none to consider. Where a *civis sui iuris* was enslaved or deported, his assets usually were forfeited to the State. On *adrogatio* they passed to the adrogator, but certain rights were so intensely personal that they did not pass but were extinguished, e.g., the right of an adstipulator¹. The right (or duty) of *tutela* was not in general affected by *c. d. minima*, but *tutela legitima*, which rested on the agnatic connexion and the resulting right of succession, was destroyed, not exactly by the *capitis deminutio*, but because the right of succession on which it depended had itself ceased to exist.

Destruction of liabilities. This did not apply to delictal or criminal liabilities. These originated in revenge, and the law recognised the fact that no legal metamorphosis affected the fact that this was the man who had done the wrong. One purpose of the law being to induce an injured person not to take vengeance personally, the principle of survival of these remedies was inevitable. But even in other cases the rule did not mean that creditors necessarily lost their money. On forfeiture, creditors were paid out of the forfeited fund, and in the cases of *c. d. minima* there were devices, varying in the different cases, by which the property could be reached in the hands of those to whom it had passed.

If the foregoing rules are carefully examined, it will be seen that they are not fully consistent, especially in the case of persons *in mancipio*. This is no doubt due to historical changes not merely in specific rules, but in the conception of *capitis deminutio* itself. It is clear that the threefold scheme as we have it in Gaius was not ancient. Cicero knows nothing of it. There may have been two degrees in his time, but it is possible, even probable, that in the original conception there was but one. How that one is to be defined is the subject of acute controversy into which we cannot go. It must suffice to say that in early law *capitis deminutio* probably meant exclusion from the group of *gentes* which constituted the people. The question is bound up with another, as to the literal meaning of the word *deminutio*: is it lessening or destruction? Whichever view is taken cases are found irreconcilable with it. This leads naturally to the view that some cases are later accretions

¹ *Post*, § 103.

inconsistent with the original notion. In particular it is suggested, with a high degree of probability, that the idea of *mutatio familiae* which appears in classical texts as the basis of many cases of *c. d. minima* is an invention of the lawyers founding *capitis deminutio* on a notion really alien to it, and resulting in the treatment of certain cases as involving *capitis deminutio* which would not have been so regarded by the republican lawyers. On this view *adrogatio* and passing into *manus* were not originally *capitis deminutiones*, and there is indeed little doubt that the *capitis deminutio* of children of an *adrogatus* is a late idea to appear. But there are many opinions.

CHAPTER V

PERSONS: THE FAMILY. PERSONS *SUI IURIS*

33. Every male *civis, sui iuris*, i.e., not under *potestas*, was himself a *paterfamilias*. So far as he was of full age and under no incapacity, he provides no material for discussion under the head of Persons. All the ordinary law applied to him. The persons we are concerned with are those who from immaturity, insanity or other circumstances were under disabilities or special protection. All such persons were under some form of guardianship. And, till after the end of the classical age, maturity did not release women *sui iuris* from guardianship. There were two types of guardianship, *tutela* and *cura* (or *curatio*), and they must be separately considered.

TUTELA. This is the guardianship of males under puberty, by reason of their immaturity, and of women of any age, *sui iuris*, by reason, ostensibly, of their special need for protection, but actually, as we shall see, for less unselfish reasons. The former is the more important for our purposes, since the *tutela* of adult women, obsolete in later law, had become, even in the classical age, little more than a form.

TUTELA IMPUBERUM. This is defined in the Institutes, in terms which purport to be taken from Servius, a jurist contemporary with Cicero, as "*ius¹ ac potestas in capite libero ad tuendum eum qui propter aetatem se defendere nequit, iure civili data ac permissa.*" This represents the classical and later view of the institution, but many of its rules, retained even to the latest times, betray the earlier conception, which was very different. It is clear that in early law the *tutela* was less in the interest of the ward than in that of the guardian. It was a right to control the actions of the ward, for the protection of those who would succeed to the property if the ward died still *impubes*. It was for this reason that it ended at puberty. It could not be supposed that the child was thenceforward capable of looking after his own interests: the point was that since he could then marry and have *sui heredes*, the relatives had no further interest in the property. It was for this reason that the XII Tables placed the *tutela* in the hands of those

¹ In. I. 13. 1; D. 26. 1. 1, "*vis.*"

who would succeed on intestacy. "*Ubi ius successionis ibi onus tutelae*" is a maxim expressing the rule in the light of the later conception of *tutela*: in early law it was far more a right than a burden. Guardianship of some kind is no doubt universal and *tutela* might thus have been thought of as *iuris gentium*. It is however conceived of as an institution of the *ius civile*, as seems to be the case with all matters dealt with, as this is, in the XII Tables.

Every person *sui iuris* under the age of puberty had, or ought to have, a *tutor*. In the time of Gaius it was disputed whether this was to be taken at a fixed age or determined by the actual physical development of the person concerned. In later law the accepted rule was that the *tutela* should end at fourteen for males and twelve for females¹, the question not of course having presented itself for females so long as the *tutela perpetua mulierum* existed.

In early law the *tutela* was regarded as a continuation of the *potestas* or, perhaps more exactly, as the immediate supervening of a right analogous to *potestas*, to last till the *impubes* was old enough to found a *familia* for himself. In the conditions of primitive law, which does not possess the clear cut notions of a developed system, it is possible that the *tutor* was the owner of the property for all practical purposes, until the child, on maturity, passed, as it was expressed, "*in suam tutelam*." This did not mean irresponsibility, for, as we shall see, the pupil had, from very early times, on the expiry of the *tutela*, a remedy for wrongdoing by the *tutor*.

There were of course rules determining in whom the *tutela* should vest, and this leads to classifications of *tutores*, according to the mode of appointment. Of these classifications the most important is that given by Gaius and Justinian. According to this they may be:

(i) *Tutela testamentaria*². This is not the oldest form of *tutela*, but it seems to have been the most usual, and, for that reason, dealt with first by Gaius. By the XII Tables a *paterfamilias* might appoint tutors by will to those of his *familia* under puberty who were *sui heredes* and thus became *sui iuris* by his death, including grandchildren, through sons, whose father was no longer alive or in the *familia*. This was held to cover *postumi*, i.e., those

¹ G. I. 196; U. II. 28; In. I. 22. pr.

² G. I. 144 sqq.; In. I. 13. 3 sqq.; I. 14.

not yet in existence when the will was made, and, as defined by the classical jurists, this class covered all who would have been *sui heredes* if they had been born in the testator's lifetime. The appointment of a tutor was an *actus legitimus*, and thus the classical law required that it should be in Latin and by formal words (*T. tutorem do* or *T. tutor esto*); but in later law it might be in Greek, and any clear words sufficed. The appointment might be from a certain time or to a certain time, not later than puberty, and it might be conditional. When, at the beginning of the Empire, codicils to wills, informal documents embodying modifications of the minor provisions of the will, came into use, tutors might be appointed by a codicil, provided that it was confirmed expressly or generally by the will.

There were some other cases in which, though in strictness the appointment was not valid at civil law, it would be confirmed by the Praetor, as a matter of course, without enquiry (*tutela testamentaria imperfecta*), e.g., where the document appointing, or the wording of the appointment, was defective in form, or where the appointment was to an emancipated son, provided in this case that some property was left to the child. There were other cases in which the appointment would be confirmed by the Praetor, after enquiry, but these, e.g., where a patron appointed to a *libertus*, are more properly regarded as appointments by the Praetor himself, the original nomination being no more than a suggestion to which he paid attention.

34. (ii) *Tutela legitima*¹. The epithet *legitimus* applied to an institution indicates that it rests on a statute (*lex*) and the *lex, par excellence*, is the XII Tables. All cases of *tutela legitima* are based on the XII Tables or juristic inference from provisions therein. It is the original case of *tutela*, the statute having adopted what was already in usage. Its principle is that the *tutela* is to be in the hands of the person who will take the property if the ward dies still *impubes*, and is thus most directly interested in its protection. Thus the list of *tutores legitimi* will be found to reproduce the civil law rules of succession on intestacy. The cases are:

Agnati. A child has no *sui heredes*, and the XII Tables provided that in default of children the property should go to the nearest agnates and, further, that the child should be in their *tutela*.

¹ G. I. 155 sqq.; In. I. 15, 17, 18.

If there were several in the same degree they shared the *tutela* as they did the succession. If the nearest agnate was a woman, though she would succeed, the *tutela* was in the next, who would usually be *tutor* of the woman also. Late in the fifth century, Anastasius allowed emancipated brothers to succeed as agnates, subject to a certain deduction, and, a little later, adhering to the ancient principle, made them *legitimi tutores*. Under Justinian, after he had equalised the rights of succession of *cognati* and *agnati*, the *tutela* was in the next of kin, whether agnatic or cognatic.

Gentiles. In the absence of agnates the XII Tables gave the succession and the *tutela* to the *gentiles*, the members of the *gens*, but this was obsolete by the beginning of the Empire.

These cases of *legitima tutela* arose only if there was no testamentary tutor, and this rule was construed with a general tendency to exclude the *legitimus tutor*. Thus there was no *legitimus tutor* if there was a testamentary appointment not yet operative, e.g., subject to a condition not yet satisfied, or the testamentary tutor was excused or removed, but if he was actually dead, the *tutela legitima* became operative.

Patron. The XII Tables gave the patron the right of succession to a *libertus* without children, and, by juristic interpretation, the *tutela* was therefore in him. As it was the civil law of succession which governed the matter, if a bonitary owner freed, so that the freed child was a Latin, and the quiritary owner "iterated" so that the child became a *civis libertus*, the quiritary owner would be patron and tutor, though the property would in fact pass to the former bonitary owner.

Children of the patron. If the patron was dead his children took the succession to the freedman, not by inheritance from the patron, but by an independent provision of the XII Tables, and, by juristic interpretation, the *tutela* also. Thus if there were two patrons and one died, the survivor was *tutor*, to the exclusion of children of the deceased patron; and if there were several children of a patron and one died, the survivors had the succession and the *tutela* to the exclusion of children of the deceased child.

Parens manumissor. Where a son was emancipated under age, and the process had been carried out in the usual way with a resale to the *parens* after the third sale, and a manumission by him, he was quasi-patron and had the right of succession and

tutela, like the patron. It is possible that in early law the case was not distinguished from that of the patron but it is clear that in classical and later law it was regarded as a distinct type of *tutela legitima*.

(iii) *Tutela fiduciaria*¹. This was, as the name shews, a *tutela* arising from a trust. There were two cases:

Extraneus manumissor. If, in an emancipation, after the third sale, the subject was freed by the fiduciary buyer, without resale to the *parens*, the former became quasi-patron, with the same right of succession at civil law (though not at praetorian law) and therefore the *tutela*. But though his *tutela* satisfied the requirements of *tutela legitima*, it was classified under a separate head as fiduciary. The case could not arise under Justinian, owing to the change in the form of emancipation.

Liberi parentis manumissoris. If the *parens manumissor* died while the *emancipatus* was still under age, his other male children were *tutores*, and were regarded as fiduciary, not *legitimi*. The reasoning by which Justinian accounts for the fact that the *tutela* is fiduciary and not *legitima* like that of *liberi patroni* is defective: there is no reason why it should be *legitima*, since, at least in historic times, there is no trace of a civil law right of succession, and there was a *fiducia* behind it, though they were not parties to this. But the name fiduciary is a misnomer in Justinian's time, since the *fiducia* had disappeared from the form of emancipation.

(iv) *Tutela a magistratu dativa*². If there was no tutor under the foregoing rules, or if, from any cause, one of these *tutela*e was not operative for the moment, a tutor would be appointed by the magistrate. This mode of appointment, which, as we know it, reflects the later view of *tutela* as guardianship, was probably, in its origin, associated with the decay of gentile *tutela*. When it first appeared is unknown, but an early *l. Atilia* provided for appointments in Rome by the Praetor and a majority of the Tribunes and a *l. Titia* or *Iulia et Titia* (perhaps two *leges*) of about the close of the Republic enacted that in the provinces the appointment should be by the *Praeses*. Early in the Empire it seems to have been by the Consul in Rome, but in the second century a special official was appointed, a *praetor tutelaris*, for this duty, which, indeed, was no part of the ordinary functions of a

¹ G. I. 166; In. I. 19.

² G. I. 185 sqq.; In. I. 20.

magistrate. Under Justinian the appointment in the Capital was by the *Praefectus Urbi* in some cases, by the *praetor tutelaris* in others. In the provinces it was still by the *Praeses*, except that municipal magistrates might appoint if the estate was small. It was the duty of the appointing authorities to satisfy themselves of the fitness of the tutor, except that in the last case this enquiry was replaced by the taking of adequate security. There could be no conditions or limits of time on any appointment. Any person interested, relatives, friends or creditors, could apply to have a tutor appointed: *liberti* were bound to apply on behalf of their patron's children, and mothers were so bound on behalf of their children, under the penalty of loss of their rights of succession.

Tutela being a *publicum munus* a tutor was bound to serve unless he could prove a ground of excuse. The grounds were very numerous¹, the most important being ill health, poverty, office, a certain number of natural born children and the present holding of three independent guardianships. But there were many others, both absolute and temporary or partial. The system of excuses was elaborately organised in the later classical law and there were strict rules as to the time within which excuse must be pleaded. Under Justinian these rules applied to all tutors, but it is doubtful if in classical law they had any application to *legitimi* or *fiduciarii*.

Those appointed by a magistrate had in classical law—it had disappeared in Justinian's time—an independent right of "*potioris nominatio* ²," i.e., of pointing out one more fitted to be tutor in the actual case, by reason of closer connexion or the like. To make such a *nominatio* was an admission that no excuse could be pleaded.

There were also many disqualifications. To be under twenty-five, an excuse in classical law, was a disqualification under Justinian. As *tutela* was a *publicum munus*, a *filiusfamilias* could be tutor, but a woman could not, but, from the fourth century onwards, there was legislation under which, with certain safeguards, mothers might be appointed, by the magistrate, tutors to their children. Under Justinian's latest legislation³ they were *legitimi tutores* in the absence of the father's claim, a rule which applies in their case the old principle that *tutela* goes with succession. Deaf and dumb persons were incapable of *tutela*, and soldiers and some other public servants were forbidden to undertake *tutelae*.

¹ V. F. 123-247; D. 27. 1.

² P. 2. 28.

³ Nov. 118. 5.

As the tutor was appointed to the *persona* of the *pupillus*, there could be no appointment "*ad certam rem*." Each of several tutors was tutor altogether, though there was no difficulty about their arranging to distribute the administration on convenient lines. Indeed, as we shall see, such distribution was often provided for by the appointing will, and the Edict provided a machinery for distribution under the Praetor's authority. There were however exceptional cases of appointment for specific purposes. Thus, in classical law, a tutor might be appointed by the *Praetor Urbanus* (*tutor praetorius*) to act for the ward in litigation arising between him and his ordinary tutor. Under Justinian a *curator* was appointed for the purpose. And it seems that a special tutor might be appointed by the *praetor tutelaris*, the ordinary appointing officer, to deal with properties so remote that it was very inconvenient for the ordinary tutor to deal with them.

35. FUNCTIONS OF THE TUTOR¹. All tutors except those appointed by will, or by the superior magistrates after enquiry into fitness, were required to give security, which might however be remitted in the case of *patronus* or *patroni filius*, if he was a substantial man and the estate was small. The municipal magistrates were bound to see to this, and were liable to an action if no security, or not enough, was taken. The security was given to the ward himself or his slave and took the form of an undertaking, by sureties, "*rem salvam pupillo fore*"². If the ward was *infans* and thus *incapax*, and had no slave, the security was given to a public slave or even to the magistrate or his nominee. But in Roman Law it was impossible, strictly speaking, for a person to acquire rights under a contract made between other people. The ward on this principle could not have sued on the contract made with the *servus publicus*: but he was allowed, by an illogical concession, an *actio utilis*. An inventory of the property must be made before the administration was begun. The actual care of the child was not necessarily with the tutor, but he must make suitable provision out of the estate for maintenance and education. In the management of the ward's affairs the tutor's functions consisted of *Administratio* (*negotiorum gestio*) and *Auctoritatis interpositio*. The former was carrying out business transactions on behalf of the ward. The latter was giving authorisation to transactions by the ward himself. In *administratio*

¹ U. II. 24 sqq.; In. I. 21.

² G. I. 199; In. I. 24.

the tutor was bound to act in a business-like way, but there were some positive restrictions on his operations. Severus forbade the sale of lands except under directions in the will or by authority of the magistrate. On the other hand, later legislation ordered the sale of certain forms of unproductive property, and houses, but Constantine reversed this by putting all lands, houses and some valuable moveables under the rule of Severus. Apart from this the tutor might, and was bound to, take all ordinary business steps, pay debts, bring and defend actions, or, if the ward was old enough to be made a party, represent him in the actions, invest money and so forth. He could act for his ward in alienation and acquisition by informal methods, but not by *mancipatio*: broadly speaking, he could act in all *iure gentium* transactions, but not in those *iure civili*. By his transfers of property the ownership would pass, in classical and later law, directly to or from the *pupillus*. But the case was different with contract. This was a more personal matter, and if the tutor made a contract, the legal rights and duties under it attached only to him and did not directly affect the ward at all, though of course these matters would be material in the adjustment of accounts between them. So too, if a tutor sued or was sued on behalf of the *pupillus*, the judgment affected only the tutor. But this point was dealt with, at latest, by the second century of the Empire: if the circumstances shewed that on the facts it was reasonable that the tutor should have acted instead of authorising the ward, further proceedings under the judgment (*actio iudicati*) lay directly to or against the *pupillus* himself. But he still could not sue or be sued on a contract made by the tutor. A rule appeared, however, that at the end of the *tutela*, action could be brought against the ward, in the form of an *actio utilis*, on transactions by the tutor in the ward's affairs, and the tutor could not be sued¹. It is possible that the same rule applied to claims by the ward on such transactions, but it is not so clear and not so necessary, since the tutor could, at the end of the *tutela*, "cede" to the ward all rights of action affecting him, *en bloc*, so that the ward could then sue. The liabilities could not have been ceded in this way.

The tutor must of course act properly in the ward's interests, but the degree of care called for seems to have varied historically.

¹ C. 5. 39.

At first liable only for *dolus*, from which great negligence in dealing with the affairs of another is hardly distinguishable, he was liable in later law for failure to shew the same care that he did in his own affairs, and perhaps for even the slightest negligence—*culpa levis*. It should be added that *administratio, negotiorum gestio*, was the management of business: it did not include, for instance, a power to make gifts, which were therefore not merely breaches of duty, but were absolutely void. The rule was applied with what must have been inconvenient rigidity. Thus the tutor could not give time to a debtor¹, since this was a gratuitous benefit, though on the facts it might be to the advantage of both parties.

Auctoritatis interpositio. This is concurrence in and approval of a transaction entered into by the ward himself, involving presence—ratification did not suffice—and taking the form, in classical law, of a reply, “*auctor fio*,” to an interrogation by the other party. In later law the precise form does not seem to have been needed and the other party need not be present. There could be no conditions on the authorisation and though refusal to authorise when it was desirable was a breach of duty to be accounted for, *auctoritas* could not be compelled: the very essence of it was the judgment of the tutor.

The purpose of *auctoritatis interpositio* is to provide the *iudicium*, the judgment whether the proposed act is wise or not, which is obviously lacking in a child. But it was not in strictness possible until the child was old enough to go through, or be prompted through, the necessary forms of the transaction. The technical name for this is *intellectus*, the capacity to understand the legal nature of the transaction to be undertaken, a capacity which is of course very far short of knowing whether it is wise or not. Thus, logically, there could be no *auctoritatis interpositio* so long as the child was *infans* (which originally meant, as yet unable to speak, but in late law was fixed at seven years) or so long as the child, though no longer *infans*, had not as yet *intellectus*, in which state he was said to be *infantiae proximus*. It will be noted that actual *infantia* was a bar, quite apart from lack of *intellectus*, in all cases in which the transaction involved speech. Thus the normal occasions for *auctoritatis interpositio* begin when the child has *intellectus*, when he is said to be *pubertati proximus*. But in actual

¹ D. 26. 7. 15.

practice the logical principle was somewhat disregarded, and *infantiae proximi* were allowed to contract with *auctoritas*, and even *infantes* in some cases in which speech was not needed¹. This relaxation of principle was useful for *iure civili* transactions in which it was impossible for the tutor to act alone.

The ward could better his economic position but could not bind himself, and thus *auctoritas* was needed only where the transaction involved some form of alienation or the incurring of a liability. But the most common transactions create liabilities on both sides, and fairness clearly required that a ward who had contracted without *auctoritas* should not be allowed to claim the benefit and repudiate the liability². If he repudiated the obligation he must restore any benefit received, and, conversely, he could not enforce an obligation without performance on his side. If he had done his part he could sue on the contract or reclaim what he had given. If the transaction had been fully performed on both sides, he could still reclaim, but only on restoring what he had received. He could not give a valid receipt, without *auctoritas*, but if he sued again he must account for what he had received or what had been acquired with it. A receipt with the *auctoritas* of the tutor was the proper discharge, but Justinian allowed the tutor to give a receipt by leave of a judge.

No tutor could authorise an act in which he had an interest. If there were other tutors, *auctoritas* by one of them would usually meet the difficulty: if there were none it would be necessary to appoint a *tutor praetorius*.

If there were several tutors they might administer in common or agree as to a distribution or arrange for one or more to administer, the others standing aside. In such a case it seems that those not acting at all were still liable, but only in the last resort. For testamentary tutors the Praetor introduced an elaborate scheme for distribution, with many alternatives, and if this was adopted, those not acting were, it seems, not liable at all, except perhaps for failure in a general duty of supervision. The same system was applied in the second century to those appointed by the superior magistrates and under Justinian to all tutors. All this has to do with *administratio*, but it applied to *auctoritatis interpositio* also, since in the case of testamentary tutors and, in the opinion of

¹ G. 3. 109; D. 36. 1. 67. 3.

² G. 2. 82 sqq.; In. 2. 8. 2; D. 18. 5. 7. 1.

some jurists, of those appointed by the superior magistrates, the *auctoritas* of one would suffice, at least for any act which did not end the *tutela* altogether; while for other tutors, to whom the praetorian scheme did not apply, the *auctoritas* of all was needed in classical law. Under Justinian that of one sufficed¹. But the history of these matters is the subject of controversy.

36. The *tutela* would be ended by the death or *capitis deminutio* or puberty of the ward. Many events might cause transfer of it, e.g., death or *capitis deminutio maxima* or *media* of the tutor, or *minima* of a *legitimus tutor* (since his *tutela* rested on his right of succession based on relationship or right of patronage, which no longer existed), expiry of the time for which he was appointed, and so forth. But there was a case which calls for more detailed treatment. There was a procedure, *crimen suspecti tutoris*², based on the XII Tables, under which a tutor could be removed for misconduct. It involved a petition brought before the chief magistrate of the district, and as *tutela* was a *publicum munus*, anyone might bring it, even a woman, if she was related, or the purity of her motives was clear. The matter was entirely in the discretion of the magistrate and thus there was no exact list of grounds, but they may be grouped as fraud, incompetence or gross negligence. If the allegations were proved, there was no question, in this procedure, of damages; the tutor was simply removed from office. If the ground was fraud he became *famosus*: in other cases the only effect was removal, and where the *tutor suspectus* was a patron the ground of removal was not stated, so that he did not become *famosus* in any case. In his case, however, and in that of a *pater*, we learn from the Digest that it was not usual to remove him, but to appoint a *curator* to act with him³. But though, under Justinian, all this machinery applied to all tutors, it seems in classical law to have applied only to *testamentarii* and *dativi*, and very probably it was allowed only for *dolus*. There is some evidence that there existed an independent power of *remotio* by the magistrate, *mero motu*, applicable to any tutor and on any ground, and it has been suggested that the rules as we have them are a late fusion of these two institutions.

At the end of the *tutela* there would be an adjustment of accounts. The tutor would have to account for all receipts and

¹ C. 5. 59. 5.

² In. 1. 26.

³ D. 26. 10. 9.

might take credit for proper personal outlay in the ward's concerns. If he had committed any actual delict in connexion with the ward's property there would of course be the same delictal remedies as in any other case. But there were two special remedies.

Actio de rationibus distrahendis. This is essentially a delictal action, based on the XII Tables, for double damages, and lying only for actual embezzlement of the ward's property. It seems to have owed its origin to the equivocal position of the ownership in the early days of *tutela*. The notion of theft, like, indeed, the notion of ownership, was much less refined than in the developed law. Acts by the tutor could probably not be brought under the existing conception of theft, and this remedy was introduced to meet the difficulty. It remained in existence throughout the classical law and though it is not mentioned by surviving classical texts, it appears in the Digest. But it was narrow in scope and was supplemented by the *actio tutelae*. This was an action for damages for any breach of duty on the part of the tutor. It was already in existence in the time of Cicero, but, as we have seen, the obligation of the tutor was intensified as time went on, with a corresponding extension of the cases in which this action would lie. There is a further point. The action lay at first only for maladministration, for wrong action, not for inaction. A tutor who simply refused to act was not liable to it. In the first century of the Empire a magisterial direction to act made him liable, but by the second century this was not necessary: inaction causing damage was a ground of liability, though the action in this case was *utilis*. In the *actio tutelae* account would be taken of any claims the tutor might have for his own outlay and this *ius retentionis* was it seems at first the only way in which he could get recoupment of these expenses. If no *actio tutelae* was brought, or if his outlay exceeded the ward's claims, he was helpless at this stage, a state of things which has led some writers to hold that the *actio tutelae* was so framed that it might be brought by either party, and either party could be condemned to pay what proved to be due on balance. However this may be, it is clear that in later law the tutor had an independent action, the *actio tutelae contraria*, for the recovery of these expenses, and it is fairly clear that in the classical law he had an independent action, though it is disputed whether it was this action or an *actio negotiorum gestorum utilis*.

37. *TUTELA PERPETUA MULIERUM*. The general principles of the perpetual *tutela* of women were the same as those of *tutela impuberum*: it is therefore not necessary to do more than indicate the numerous differences of detail. These will be found to reflect the fact that this institution is an uncompromising expression of *tutela* as in the interest of the tutors, lifelong, because the interest in the inheritance is lifelong, since a woman can have no *sui heredes*. Gaius indeed says that it was supposed to be needed on account of their "*levitas animi*," but he adds that this is more specious than true¹. Though the *tutela* seems to have existed until the end of the fourth century, it is evident that in the Empire it was, so far as pure Roman Law is concerned, little more than a nuisance to all parties. Its rules, as we shall see, were so far modified that no tutor except *legitimus* had any real power, and the most oppressive of the *tutela legitimæ*, that of the agnates, was abolished.

As to modes of appointment, the chief differences were the following:

The husband of a woman *in manu* could appoint a tutor, but he could also give the wife a power of choosing her tutor—*tutoris optio*—and this might be absolute, *plena*, or limited, *angusta*, the difference being that in the former case she might change him as often as she liked, while, in the latter, a limit was placed on the number of changes. A tutor so chosen was *tutor optivus*².

The agnatic *tutela* of women was abolished by Claudius (A.D. 41–54)³. This was held to apply to females of any age, but the *tutela* was reintroduced by Constantine, for girls under twelve.

As we have already seen a woman could, with the consent of her existing tutor, change her tutor by the process of *coemptio fiduciaria*: the resulting tutor was of course a *tutor fiduciarius*.

A certain class of tutors, *tutores cessicii*, existed only in the case of women. *Legitimi tutores*, but these alone, were allowed to transfer the *tutela*, on account, says Gaius, of its burdensome nature, by a formal transfer, *cessio in iure*. The transferee was a *tutor cessicius*. This *tutela* ended by the death or *capitis deminutio* of *cedens* or *cessicius*, and also by any attempt to cede it to another⁴.

These various rules illustrate a striking feature of the *tutela* of women, i.e., the facility with which it could be shifted, an expression in fact of its unimportance. The cases we have mentioned

¹ G. I. 190.

² G. I. 150 sqq.

³ G. I. 157.

⁴ G. I. 168 sqq.

all involve the cooperation of someone else, but there were other rules enlarging the woman's power. Any woman inconvenienced by the absence of her tutor, other than *legitimus*, might apply to have another appointed, which done, the absent one ceased altogether to be tutor. In the case of a *legitimus tutor* this was allowed only in case of urgency, e.g., to provide for a *dos* or the acceptance of a *hereditas*. In this case the replacing tutor was appointed by the Praetor (*tutor praetorius*) and served only so long as the urgency lasted. And there were other cases, so that the rule, *tutor ad certam rem dari non potest*, was subject to much exception in the case of women.

The duties of *tutor mulieris* were very different from those of *tutor impuberis*. She administered her own affairs, so that there was no *administratio*. And a woman could do many things without *auctoritas* which an *impubes* could not¹. *Auctoritas* was needed for taking part in a *iudicium legitimum* (the usual form of litigation in classical Rome), for incurring any *obligatio*, or taking part in any *iure civili* transaction to the possible prejudice of the estate. Such transactions would be making a will, accepting an inheritance (for it might be *damnosa*), alienation of any right by *mancipatio* or *cessio in iure*, or formal creation of a *dos*. And she could not without *auctoritas* give a fictitious receipt, *acceptilatio*. All else she could do without *auctoritas*. But, even apart from this, her position was different. In the case of all tutors, except *legitimi*, *auctoritas* could be compelled, if the Praetor thought fit. Indeed it might be compelled, even from the *legitimi*, for everything but making a will, mancipating property or contracting an *obligatio*, their own interest being baldly assigned as the reason for these exceptions. But even in these cases it could be compelled, says Gaius, if there was "*magna causa*." And they were not responsible for wrongful refusal as the tutor of an *impubes* would be. It must also be remembered that after Claudius, the only *tutor legitimus* of an *ingenua* would be her former *paterfamilias*. These rules have the result that there was no responsibility on the tutor of a woman, and thus no occasion for the *actiones tutelae* and *de rationibus distrahendis*. And no security seems to have been necessary.

The *tutela* would be ended by the same facts as would end *tutela impuberis*, except that maturity did not affect it—it was lifelong.

¹ G. I. 190 sqq.

And there was another cause of termination. A woman with the *ius liberorum* was released from *tutela*. This privilege was acquired by having three children (four for a *liberta* in her patron's *tutela*) and it might be given as a special grace without satisfaction of the condition. When, in A.D. 410, the *ius liberorum*¹ was given to all women, the perpetual *tutela* of women disappeared, if, indeed, it was not already obsolete in Roman practice. Later documents shew women acting with tutors, but this is explicable partly by the common phenomenon of the survival in practice of formalities no longer legally necessary, and partly by the fact that many of the documents came from regions of the Empire in which the traditions were Greek, and, in practice, the local custom, by which the wife was in the guardianship of her husband, was more observed than the imperial law. After the disappearance of the perpetual *tutela*, females were in *tutela* till the age of twelve, at which marriage was possible, and the rules in other respects are the same as those of *tutela impuberum*.

38. *CURA, CURATIO*². The law of the XII Tables recognised two other forms of guardianship, *cura furiosi* and *cura prodigi*. Though of much the same character as *tutela* they are distinguished from it, because as they may supervene long after the subject of them has become *sui iuris*, it is not possible to regard them as artificial continuations of the *patria potestas*, which seems to have been the view then taken of *tutela*. Another case of *cura* is *cura minoris*, which as an organised system is much later. There were also certain cases in which a *pupillus* was placed under the *cura* of someone other than his tutor, *cura pupilli*. All these cases must be considered.

Cura furiosi. A *furiosus* is a lunatic, conceived of as capable of lucid intervals. The XII Tables placed such persons under the care of their *agnati* or, failing *agnati*, their *gentiles*, provided there were no *custos*. The meaning of the exception is not certain: probably those who were dangerous were placed in charge of a keeper. The word used in the XII Tables is *potestas* but in historic times the guardianship is known as *cura*. The original name suggests larger powers than those of a tutor, and in fact the powers were greater. The *curator* had custody of the person of the lunatic and could alienate his property even by formal modes. In a lucid interval the *curator* ceased to act, but on relapse, it was settled

¹ C. Th. 8. 17. 3.

² In. 1. 23.

after doubts, that the *cura* revived. The Praetor extended a similar *cura* to other cases of mental disease or incapacity and to some forms of physical disorder. In these cases the Praetor appointed (usually accepting a person nominated in the will of the *paterfamilias*) as he did in cases under the XII Tables, if there were no agnates; indeed in later times he seems to have had discretion to exclude the agnates, if he thought fit. For maladministration an *actio negotiorum gestorum* lay against the *curator*.

Cura prodigi. The XII Tables, following existing custom, placed in the *cura* of their agnates those who wasted property received on intestacy. There was a preliminary enquiry, followed by a formal interdiction by the magistrate, forbidding the *prodigus* to manage his own affairs. The Praetor extended the interdiction and the resulting *cura* to all cases of prodigality. The history of the modes of appointment is as in the last case, and the *cura* lasted so long as the interdiction stood. We are told that it ceased *ipso facto* when he was restored to *bonos mores*, but it would seem that there must have been some formal step. The powers of the *curator* were, it is generally held, less than in the last case. We are told that as the *prodigus* could not administer his property he could not mancipate or make a will, and nothing is said of concurrence of his *curator*. But we are also told that he could accept a *hereditas*, and as this might involve a loss, it would seem that concurrence of his *curator* was needed. He could, at least in later law, do acts of pure acquisition. The remedy for maladministration by the *curator* was an *actio negotiorum gestorum*.

Cura minoris. It is obvious that a boy of fourteen or a girl of twelve would not be capable of managing their own affairs, but very early law seems to have made no provision for them, and such protection as was provided by legislation and practice in the Republic was somewhat crude. Systematic provision for guardianship is much later. The first step was a *l. Plaetoria*, or *Laetoria*, which is said to have established actions against those who committed frauds against persons under twenty-five, and an *exceptio legis Laetoriae* was available as a defence if the fraudulent transaction was made the basis of a claim. This made dealings with minors a precarious business, for fraud might be lightly alleged, and a practice developed under which persons dealing with minors required the concurrence of an adviser for the minor.

Such an adviser was in historical times called a *curator*, but he seems to have acted only for the individual transaction, and to have hardly had at first anything like an official position in the matter. His concurrence was simply *prima facie* evidence that the transaction was fair.

The Praetor introduced a new machinery¹—*Restitutio in integrum*. He allowed transactions to be set aside by minors if it was shewn, not merely that they were bad bargains, but either that they were fraudulent, or that they were such that the minor would not have made them but for his inexperience—his *inconsulta facilitas*. The matter was in the discretion of the Praetor. Here too the presence of an adviser, though not conclusive, would at least be evidence that the transaction was reasonable. In the first century of the Empire the rule appeared that anyone who was about to litigate with a minor, or to pay a debt to him, or to settle the accounts of his tutorship, and perhaps in some other cases, might require that a *curator* be appointed to assent to the transaction, but this *curator*, too, was only temporary. A reform attributed to Marcus Aurelius introduced a new system. Any minor might ask to have a *curator* appointed. The Praetor appointed, and the *curator* served till the minor was twenty-five, though, after Caracalla, an imperial decree might give the rights of full age at an earlier date, which Constantine fixed at a minimum of twenty for males and eighteen for females (*venia aetatis*)². Owing to the fact that the institution is little discussed in classical texts, we have to rely mainly on those of Justinian's time, and as there had unquestionably been great changes, the earlier history of the matter is still obscure. In the classical system the position of the minor seems to have been little affected by the existence of a *curator*. He could still act without the *curator*, and there was, whether he did so or not, the right of *restitutio in integrum*, though if the *curator* had consented to the transaction, this would no doubt be more difficult to get. The consent of the *curator*—it is commonly called *consensus*—was given informally, but seems to have needed presence. At some time before Diocletian, according to the texts, there was a change. It became usual, almost a matter of course, for a minor to have a *curator*. Further, the position of a minor with a *curator* became much like that of a *pupillus*. He could do acts which benefited

¹ P. I. 7. 2.

² C. 2. 44. 2.

himself without the concurrence of his *curator*, but he could not so bind himself. The later story of the matter is one of steady and progressive assimilation of this relation to that of *tutela*. Thus the rules as to grounds of excuse, security, removal for misconduct, restrictions on the guardian's power of alienation and many others, are made in the Digest to apply to the *curator* as well as to the tutor, though it is clear that with regard to most of them this is the result of interpolation.

On another point there is controversy. In Justinian's law the texts shew that for both tutor and *curator* the *administratio* is the most important and most practical part of their function: the *auctoritas* of the tutor, the *consensus* of the *curator*, appear much less frequently. For the tutor that was to be expected—a child will not take much part in business. But it is equally evident for the *curator minoris*. The estate of the minor is thought of as entirely in the hands of the *curator* and, in practice, the cooperation of the minor and the *curator* by means of the *consensus* of the latter appears in general only where it is unavoidable, e.g., where the minor has been made the party to an action, or in formal transactions which could not be done by representative. It is doubtful if this was so in classical law when the texts were written, and the extreme view has been maintained that all allusions to *administratio* by the *curator* are interpolated, the classical *curator* having no function but that of giving *consensus*.

39. *Cura pupilli*. In some cases a *pupillus*, normally under *tutela*, might receive a *curator*. The chief cases are:

Absence or temporary excuse of the tutor. In classical law a *tutor ad rem* would be appointed, but in later law a *curator*.

An incapable tutor or a patron or *parens* of bad character would not necessarily be removed, but a *curator* might be appointed to act with him.

For litigation between a tutor and his ward a *curator* was appointed in later law, a *tutor praetorius* in classical law.

A girl over twelve but still a child could not manage her own affairs and her tutor had no *administratio*. It is possible that in such a case a *curator* might be appointed, but as the case disappeared with the perpetual *tutela* of women, this cannot be proved from the texts.

There were other cases but some of them, like some of the foregoing cases, appear to be of late origin.

CHAPTER VI

THINGS. PROPERTY. MODES OF ACQUISITION *IURE CIVILI*

40. The second of the branches, or aspects, of the law is by far the most comprehensive. It covers nearly the whole of the ordinary substantive law, the law of the rights and duties of the ordinary man. *Res*, in the sense in which it is here used, means any economic interest guaranteed by law, any right or rights having a money value, any interest expressible in terms of money which the law will protect. It will be seen that this is very different from a physical "thing." The point of contact is that the great majority of these rights are rights over or concerning physical things. Ownership (*Dominium*) is a *res* in the technical sense: it is the greatest of all rights over a *res* in the physical sense. The name *res* is applied, now to the right, now to the thing over which it exists, just as in English the expression "I have a watch" and "I have the ownership of a watch" may be used to express one and the same idea. It is not therefore surprising that in the classifications of *res* with which Gaius and Justinian begin their discussion¹ it is not always easy to say which is the point of view. In the main classification, physical things appear to be mainly thought of, and they are classified according to the rights which exist over them. From this point of view *res* are:

(i) *Res communes*, regarded as common to all, but not capable of appropriation by any. Such are the air, running water, the sea, and, in later law, the seashore to the highest winter floods. There was no right to build on the shore, but, by leave of the magistrate, shelters might be erected and held exclusively. But they gave no ownership in the soil, and all rights lapsed if the shelter was taken down or fell. In the earlier classical law the shore seems to have been thought of rather as public.

(ii) *Res publicae*. The property of the State, such as highways, rivers and harbours, the banks of the rivers being public *quoad usum*, for the purposes of navigation, etc.

¹ G. 2. 1-9; In. 2. 1. 1-10.

(iii) *Res universitatis*. Property of a corporate body such as a *civitas*, e.g., the *stadia*, *theatra* and other public buildings.

(iv) *Res nullius*. These include, besides the obvious case of things which do not at the moment belong to anybody, such as wild animals and things abandoned, three classes of *Res divini iuris*: (a) *Res sacrae*, temples, churches and their contents, which Gaius speaks of as devoted to *Di superi*, and Justinian as devoted to God. Such things could not be commercially dealt with, except that Justinian allowed sale of them for redemption of captives; (b) *Res religiosae*, the ground occupied by a corpse lawfully buried there with the consent of any persons having an interest in the land. For Gaius these are devoted to the *Di manes*, but this is of course obsolete in the Christian Empire. As land in the provinces was not in classical law owned, strictly speaking, by private holders, it could not be made *sacrum* or *religiosum*, but in practice, Gaius tells us, it might be *pro sacro*, *pro religioso*; (c) *Res sanctae*, the gates and walls of the city, but this is of little importance in private law.

These four classes of *res* are said to be *extra patrimonium*, as opposed to the subjects of private ownership, *res in patrimonio*.

It is to be noted that all this classification turns largely on the nature of the things themselves. It is not merely a question of their ownership: they are, in the main, things not susceptible of exploitation for private purposes. But the State or a corporate body may own other things, such as land or slaves. These also are, strictly speaking, *res publicae* or *universitatis*.

The proposition that rivers are "public" needs some comment. The bed is not public, but ordinarily belongs to the riparian owners. The running water is *communis*. It is the river as such which is public, and perhaps the better view for classical and later law is, though the texts are in some conflict, that the river was public only *quoad usum*. There is evidence of differences of opinion among the jurists as to some other points in the classification.

From an entirely different point of view *res* are classified as *corporales* or *incorporales*¹. The former are *res quae tangi possunt*—physical objects. The latter are rights, e.g., servitudes, usufruct, *hereditas*, *obligationes*. *Dominium*, the most important of rights, is not taken as an illustration. In fact it is never regarded as a *res*

¹ G. 2. 12 sqq.; In. 2. 2.

incorporalis. By a habit of speech found also in our own usages the notion of corporeality is tacitly transferred from the physical thing to this most comprehensive right over it, so that for practical purposes *dominium* is a *res corporalis*. *Usucapio rei* is really *usucapio domini*.

Res being rights of a money value, the name is not applied to rights belonging to the law of persons. Liberty we are told is *inaestimabilis*, and obviously damages would be no compensation for infringement of it. Similarly *patria potestas* is not a *res*, nor is *manus*. The same would appear to be true of *tutela* thought of as a right, though in one text Ulpian speaks of *tutela* over a *liberta* as a *res*¹. It is to be observed that according to the text of Gaius the name *res* is not confined to those rights which are now-a-days called rights *in rem*, that is to say, rights available against persons generally. It covers also obligations, rights available only against specific persons, such as those arising directly out of a contract. But there are signs that this was not an old notion in the time of Gaius: in another text he distinguishes between *res incorporales* and *obligationes*². Probably it was in earlier law confined to those rights available against all (other than *dominium*), those rights enforced by an *actio in rem*, rights grouped together under the name *iura*.

Other classifications of *res* with which we shall be concerned are those into *res Mancipi* and *nec Mancipi*, the former being things of which *mancipatio* was the appropriate means of conveyance.

Res soli, *res mobiles*, a distinction important in many ways, but especially in the law of acquisition by long possession, in that of possession itself and in that of theft.

Res divisibiles and *indivisibiles*, a distinction having some importance in the law of servitude and usufruct, and still more in that of *obligatio*.

The distinction between *solum provinciale*, the *dominium* of which in classical law was in the Emperor, though as we shall see the private holder had in fact practical ownership, and *solum Italicum*, which was the subject of private *dominium*, was of such importance that it may be mentioned here, though it was obsolete under Justinian and never had any application to moveables.

¹ U. 19. 11.

² G. 2. 14; 3. 83.

41. Though *res* may be either *iura in rem*, rights available against all, e.g., *dominium*, or *iura in personam*, rights available only against a specific person or group of persons, such as the right arising from a contract, the classification of the Roman lawyers does not proceed directly from this conception. They looked rather at the remedy, and distinguished those rights which gave an *actio in rem*, which they treated first, from those which gave an *actio in personam*. The result is much the same, and we can safely speak of the first part of the *ius quod ad res pertinet* as concerned with *iura in rem* and the second part with *iura in personam*. To the first part commentators sometimes give the name *Dominium*, which in strictness means only the most important of the rights considered, and may be provisionally called ownership, though, as we shall see later, this is a little misleading. The second part the Romans themselves call *Obligatio*, though, here too¹, some caution is needed. The word *obligatio*, in the sense in which Gaius uses it, did not cover the whole field of those rights which would now-a-days be called *iura in personam*.

Roman Law had not the notion of patents, copyrights, trade marks, and so on which complicate our modern classifications, and thus the rights treated in the first part of the *ius rerum* (*iura in rem*) are all rights which are concerned with some physical thing, rights *in rem* in a literal sense. Apart from ownership itself, they are all rights less than ownership over things vested in some person other than the *dominus rei*. If we think of ownership as a bundle of rights we can see that some of these may be conferred on some person other than the owner. Of these rights detached from ownership there are two important groups. One group, known, at least in later law, as Personal Servitudes, has, as its most important representative, the right of Usufruct. The characteristic of all the members of this group is that the whole or a substantial part of the rights involved in ownership is vested for the time being in some person other than the owner. Thus a usufruct is the right to enjoy the property, for a time, or for life, the owner's enjoyment being postponed till this right has expired. Such a right is in effect a part of the ownership and is in fact frequently so called in the texts. The other group consists of Praedial Servitudes. These are specific rights over the property, vested in

¹ *Post*, § 95.

the owner of another property, and not such as to bar the owner from his enjoyment. A familiar instance is a right of way. Unlike usufruct these rights attached only to land. Such limited specific rights can also be thought of as detached parts of ownership, but this was not in fact the way in which they were looked at: they were regarded rather as burdens on ownership. Thus the buyer of property had a right to claim damages if there afterwards appeared a usufruct in the hands of a third person, because he was deprived of a part of the thing purchased, but the existence of a right of way gave him no right of action, unless the land had been expressly sold as free from any servitudes¹.

Apart from these servitudes there also existed in later law some rights over land, not known to the civil law, and not classed as servitudes, namely *Emphyteusis* and *Superficies*, which have some resemblance to, but some marked differences from, usufruct.

So far, the law of *iura in rem* is concerned with the acquisition and alienation of *dominium*, etc. in specific things. But there are events, of which death is the most important, in which the whole of a man's property passes to another or others. This is called in the texts acquisition *per universitatem*. Under this head are considered wills and intestacy, together with some other cases. In later law this succession on death is thought of as *successio in universum ius*, the *hereditas* with all its rights (and liabilities) being thought of as a unit, a *universitas iuris*. This expression is not to be found in Gaius and it is held by some writers that in his age the *universitas* thought of in the expression *acquirere per universitatem* is merely the aggregate of physical things.

All these various rights we shall have to consider.

42. *DOMINIUM*. Ownership may be described as *ius utendi fruendi abutendi*, the right of using enjoying and destroying, the right of transfer being included in the notion *fruendi*. But, regarded as a definition, this description needs important limitations. A man's enjoyment of his property must not be such as to interfere with the rights of other people. And the State may, and commonly does, impose limits on his use of the property. Building above a certain height or within a certain distance of a boundary, for instance, may be prohibited. And the right may be restricted by the existence over the property of rights vested in other people,

¹ D. 18. 1. 59.

such as usufruct. But, as a definition of Roman *dominium* it is unsatisfactory in other ways. All these rights might be vested in someone who was not *dominus*. Of some forms of property the *dominium* could be transferred only by highly formal methods. If the *dominus* transferred the *res* informally by mere delivery, even though he intended to transfer his *dominium*, this remained in him. But he had nothing but the name. The real beneficiary interest passed under praetorian law to the transferee, who was said to have the thing *in bonis* (bonitary ownership). In course of time the *dominus* would lose even this empty *dominium*, for the holder would acquire the *dominium* by lapse of time (*usucapio*). This particular case disappeared under Justinian, but there was another somewhat akin, but rather less comprehensive, i.e., *emphyteusis*. It is thus difficult to define *dominium* precisely. It is the ultimate right to the thing. It is akin to the "legal ownership" of English law, which may or may not be emptied of economic content by equitable ownership in another.

Assuming absence of other or minor claims to the *res*, the limits on the right of the *dominus*, apart from those already considered, are chiefly to be found in the matter of alienation. An owner in alienating could reserve a usufruct in himself, or he could confer a usufruct retaining the *dominium*, or, if it was land and if he had other land, reserve praedial servitudes, or could confer such rights, over land he held, on an adjacent owner. He could not annex to the land burdens of other descriptions. Thus, though he might agree with his buyer that the latter should erect a building on the land sold and, on this contract with his buyer, an action would lie if the building was not erected, this undertaking would not be enforceable against a subsequent purchaser of the land from the buyer, as a reserved right of way would.

Dominium might be transferred to begin in the future or on a certain event (*dies* or *condicio*). But as the formal modes of conveyance in classical law did not admit of such suspension or condition, this was effectively the rule in classical law only for, on the one hand, those things the *dominium* in which could be transferred informally (*res nec mancipi*) or, on the other, for the "bonitary ownership" which could be created informally in *res mancipi*. Under Justinian, when the formal methods of conveyance and the distinction of *res mancipi* and *nec mancipi* had disappeared, it was generally true.

In classical law ownership could not be conferred on the terms that it was to end at a certain time or on the occurrence of a certain event: there was no such thing as a terminable ownership, expressly created. An agreement that the property was to revert on a certain event, e.g., *dos* at the expiry of the marriage, would create a duty to retransfer when that event happened, but the property would not revert *ipso facto*. The same point arises under special agreements for setting aside the contract or sale in certain events. Under Justinian, however, though it does not appear that the principle of terminable ownership expressly created was accepted, there were cases in which the person, to whom the property was to be restored on the event, seems to have in fact been allowed to claim it by an *action in rem* from anyone, instead of having only an *actio in personam* against the other party. The action is usually a *vindicatio utilis*, not the straightforward *vindicatio*. The ownership has not actually reverted, but it is to be treated as if it had. But where this was done, there is of course only lip service to the old principle.

In classical law it was not possible to transfer property *inter vivos* subject to a restriction on further alienation, having the effect of making such alienation void. A further alienation would be valid, though it might be a breach of contract. It may be that this was equally true under Justinian, though there is conflict in the texts¹.

43. We have now to consider the modes of ownership, short of *dominium*, with which the Roman Law had to deal. A *peregrinus*, not having *commercium*, could not hold *dominium* in the ordinary sense, at least over *res Mancipi*. He had no share in the civil law and thus could not alienate by civil law methods, but the informal methods, being *iuris gentium*, were open to him. He had access to the Courts under the Formulary system, though the nature of his remedy for proprietary rights is uncertain. It was probably either an *actio fictitia*² with the fiction *si civis esset* or one in which he claimed, not that he was *dominus*, but *habere frui possidere licere*. The case has disappeared in Justinian's law. Similarly provincial land, even in the hand of a *civis* was not susceptible of private *dominium* in classical law: the *dominium* was in the Emperor. Such lands paid a tribute to the State: in Imperial provinces they

¹ Cf. D. 20. 5. 7. 2; 45. 1. 135. 3.

² Post, § 149.

were *agri tributarii*, in Senatorian provinces *agri stipendiarii*. These could not be transferred by civil law methods or claimed by the civil *actio in rem*, *vindicatio*, but there was a modified *vindicatio*, in which, as in the last case, it is probable that the claim was *habere frui possidere licere*. These cases too disappeared under Justinian, under whom there was only one form of ownership. It was not uncommon to grant to favoured regions, such as great towns and their surroundings, the *ius Italicum*, which had the effect that the land was free from tribute, susceptible of true *dominium* and thus alienable by civil methods and recoverable by civil remedy, constituting a civil enclave in the province.

More important however than these cases, for the classical law as it affected *cives* was that of bonitary ownership. We have noticed that this arose in more than one way, but as the principles are the same in all cases we shall not deal with the case of the successor on death with only praetorian right (*bonorum possessor*) or the buyer of a bankrupt estate (*bonorum emptor*), but only with that of a *res mancipi* which has been transferred informally by mere delivery. By this delivery the *dominium* did not pass. But an effective ownership did pass as a result of the remedies provided by the Praetor. It is this scheme of remedies which we have now to consider.

For the holding to amount to practical ownership, to be protected as well as if it were *dominium* two forms of remedy, at least, were needed. The holder must be able to defend his right to have the thing if that right were attacked, and, if from any cause the thing fell into other hands, he must have an action to recover it. Both these forms of remedy existed.

If the vendor, or someone claiming under him, brought a *vindicatio* asserting his *dominium*, which would still exist till the time of *usucapio* had expired, the Edict authorised the bonitary owner to plead as a defence that the *res* had been sold and delivered to him by the plaintiff or someone from whom he derived title (*exceptio rei venditae et traditae*), a defence extended with the necessary modifications of form to cases of alienation other than those on sale. This defence was of course useless if the plaintiff was a person with a title not derived from the vendor, for, clearly, no act of the vendor could give a right against a third party with a better title. On the other hand the defence was unnecessary

against one who claimed with no title at all, for a man must recover by the strength of his own title, not by the weakness of the defendant's.

If, however, the bonitary owner chanced to lose possession, from any cause, something more than a defence was needed; means of recovering it was called for. In many circumstances one who had actual possession and lost it could recover it by bringing an "interdict," in which all that need be proved was that he had been deprived of possession, irrespective of any question of title¹, but there were many circumstances in which this would not be possible. At some time late in the Republic an action was introduced, the *actio Publiciana*², by which the bonitary owner could recover, although, as he was not *dominus*, the ordinary civil *vindicatio* was not open to him. This action utilised the principle that long continued possession begun in good faith would ripen into *dominium* by lapse of time (*usucapio*). The Edict provided that the *iudex* in the action was to proceed as if the time had elapsed, though in fact it had not. It was a *vindicatio* with a fiction, perhaps the best known of the various *actiones fictitiae*. The instruction to the *iudex*, the *formula*, ran, in outline, roughly as follows: "If you find that *A* (the plaintiff) would have been *dominus* if he had possessed the thing for a year, give judgment in his favour, if not, absolve *N* (the defendant). As the bonitary owner would have been *dominus* if the time had run, he would be entitled to recover the thing under this formula on proof of the circumstances. The matter would not always be as simple as this: many complications might step in, but these, for the most part, we will not consider. One important point must however be mentioned. Other persons besides the bonitary owner would be able to prove that they were *in via usucapiendi*. In particular, it would usually be true of any *bona fide possessor*, that he would become owner by lapse of time, that he was in course of usucapting. It would follow that a *bona fide possessor*, e.g., one who had in good faith bought the thing from a non-owner, could bring the *actio Publiciana* as well as the bonitary owner. This in fact was so: indeed the action may have been introduced especially and primarily for his case. There is nothing unreasonable in this: one who held in good faith and was *in via usucapiendi* ought to be protected against one who had no

¹ *Post*, §§ 173 sqq.

² D. 6. 2; G. 4. 36.

title at all. It must be remembered that the Praetor did not try the case: he would not in the least know what the relation of the various parties was. But the position of the *bona fide possessor* was not quite the same as that of the bonitary owner. The latter had the action against everyone, including the *dominus* (for, if his vendor was not really the rightful owner, he would not be bonitary owner, but only a *bona fide possessor*). But a mere *bona fide possessor*, such as we have described, in favour of whom the time of *usucapio* had not run, was of course not protected against the real owner: it is not the object of the action to deprive owners of their property. In his case therefore the *formula* was somewhat different. The *dominus* was allowed to plead his ownership as a defence: "unless it appear that the defendant is *dominus*" (*exceptio iusti domini*). But, on the face of it, this would exclude the bonitary owner too, so that it would be necessary to add a clause providing for his case. As we have seen the Praetor could not know the state of the facts, so that if all the facts were in dispute the *formula* would be more complex. It might run: "If it appears that *A* would be *dominus* if he had held the *res* for the time of *usucapio*, unless *N* (defendant) is *dominus*, and even then if *N* or one under whom he claims sold and delivered the *res* to *A*, or one under whom he claims, give judgment for *A*, if not absolve *N*." Under this formula the *iudex* could do justice in the matter. If the preliminary enquiry satisfied the Praetor that there was no ground for the *exceptio iusti domini* he might refuse it: it was given only "*causa cognita*."

The case of bonitary ownership was obsolete under Justinian: there was now only one form of ownership. Partly by the abolition of all grades of free subjects other than *cives*¹, partly by the abolition of the inferior character of ownership of provincial lands², partly by the abolition of formal modes of conveyance, the inferior ownerships which had needed special protection had disappeared. But all this did not affect the *bona fide possessor*: he still had as his protection the *actio Publiciana*, since he had no ownership at all. It is true that his right to the Publician action has led some writers to hold that he had what may be called relative ownership, but this does not seem to have been the Roman view.

Protection of ownership also requires that interferences not amounting to disturbance of possession should be provided for.

¹ C. 7. 6. 1.

² G. 2. 21; In. 2. 1. 40.

The bonitary owner had the Aquilian action for damage to the *res*, not in its civil form, but as an *actio utilis*. If, being a moveable, it was stolen, besides the means of recovery, he had the *actio furti* like a *dominus*. And though we are not informed, it may be assumed that he had the various remedies for *damnum infectum*, *opus novum* and the like. In one point however he was not so well off as a *dominus*. If the *res* was a slave, the bonitary owner could not free him so as to make him a *civis*, and therefore could not institute him as *heres*. If the *dominus* and he cooperated in the manumission so that the slave became a *civis*, and he was under age, it was the quiritary owner, not the bonitary, who was his tutor¹. But it must be remembered that these and all the other characteristics of the bonitary ownership were temporary. It became quiritary ownership by lapse of time.

44. POSSESSION. We have already assumed the notion of possession. In a general way the meaning of the word is simple, but, for legal purposes, it is necessary to examine its exact sense somewhat closely. Roughly speaking we possess a thing when it is in fact at our disposal. If a thief runs off with my watch, though I still own it I no longer possess it: the thief possesses it. In most systems of law it has been found desirable to protect the possessor as such, without raising the question of his title, against interference otherwise than by legal process. The reason for this has been variously conceived by theorists and perhaps it has not always been the same. On one view it is entirely a question of public order: a claimant however well entitled must not take the law into his own hands. On another, not wholly different, it originated at Rome as a means of protection of holders of public lands (commonly called *possessionses*) for whom it was the only practical protection, since they, of course, had not *dominium*. On another view it was really for the protection of actual owners, on the assumption that a peaceful possessor is, more often than not, the person really entitled and this system of remedies enables him to protect his interest, without having to prove his title whenever some aggressor gets hold of the *res*—an outwork of *dominium*. To prove title may often be costly and difficult. If, in fact, the peaceful possessor is not really entitled, and the possessory remedy, the system of possessory interdicts, enables him to regain possession from one

¹ G. I. 167; Ulp. II. 19.

who was really entitled, this, it is said, is the exceptional case, and the latter has his remedy: he can bring his action and the question of title will be thrashed out.

A more important and more hotly disputed question is that of the exact definition of possession for the purpose of these remedies. Not every one who has the immediate control possesses. It is easy to see that I still possess the knife and fork in the hands of my guest, the spade in the hands of my gardener. As we should say, they have the custody, I have the possession. But in Rome the line was drawn in a way which at first sight at least looks arbitrary. The owner, actually holding, possesses, but the owner of a fugitive slave still possesses him¹. He who holds, thinking, wrongly, that he is owner, possesses, and so does one who knows he is not entitled, but holds the thing for himself, the *mala fide possessor*. So do the pledge creditor and the *emphyteuta*, the holder of a sort of perpetual lease. But a borrower, an ordinary hirer for a term, a depositor, do not possess: they have only Detention (*possessio naturalis*). And of course my guest, my slave, my employee handling the thing, do not possess in the legal sense. How is *possessio* to be defined so as to account for these rules? We have no clear statement in the texts and the matter is complicated by the fact that these shew signs on the one hand of differences of opinion among the jurists and on the other of "interpolation" by Justinian's compilers.

Many views have been expressed, but those most widely accepted can be reduced in principle to two, one associated with the name of Savigny, the other with that of Ihering, both, however, modified by disciples.

The first of these, conveniently called the "subjective" theory, resting mainly on texts of Paul, defines possession as made up of actual control of the thing (*corpus*) with intention to hold it for oneself (*animus domini*). The state of mind of the holder is the decisive point, though, according to some recent exponents, the state of mind is to be sometimes inferred from the legal relation. This theory accounts for the cases of the owner in control and the *bona* and *mala fide possessores*. But it hardly explains the cases of pledgee and *emphyteuta*, who are accordingly treated as having "derivative" possession. It can be harmonised with the fact that

¹ D. 41. 2. 1. 14.

the holder of a life interest, a usufruct, having only a *res incorporalis*, has not *possessio* of the *res*, but has *possessio iuris*, which came in later law, though perhaps not in classical law, to be called *quasi-possessio*. But it does not explain how it is that an owner retains possession of a fugitive slave.

The "objective" theory defines possession as being in regard to the object in question in the position in which an owner ordinarily is in relation to such objects, all the *animus* necessary being consciousness of the fact. This would lead however to possession in the borrower, etc., and this theory explains the fact that these do not possess by the view that all these are cases in which a positive rule of law, for reasons not identical in all cases, has expressly taken away possession. This explains the case of the fugitive slave, for such a slave bears no sign that he is a fugitive, and for a slave to be away from his master is normal. But the theory is not without its difficulties, especially in connexion with the acquisition of possession through the act of a subordinate. There is much dispute as to the extent to which, if at all, the intent necessary for the acquisition of possession can be supplied by the representative, and thus how far his state of mind is material to acquisition of possession by his principal.

The acquisition of possession by the acquirer's own act needs no discussion. The same might seem to be true of loss of possession, but there are texts which, speaking of land, say that if a holder makes it clear that he no longer means to possess, he no longer has possession¹. It is probable that these texts merely mean that where I, being owner, sell the land to A agreeing to go on as his tenant, I cease to be possessor and become a detentor with no actual handing over and back again. Such a transaction is what is called *constitutum possessorium*.

Acquisition of possession by the act of a subordinate is less simple. It could be effected in classical law for his principal by a *procurator*, a general agent, under authorisation or with knowledge of the principal, and in later law by any free person for one, with the same restriction. So too a slave or *filiusfamilias* could acquire it for the *paterfamilias* with his knowledge or authorisation, which however could be dispensed with, *utilitatis causa*, if the thing was to form part of the *peculium*². It was only gradually admitted that

¹ D. 41. 2. 3. 6.

² D. 41. 2. 44. 1.

a master could possibly acquire possession through a fugitive slave, though he possessed the man. On the other hand there was an old doctrine that one could not acquire possession through one whom one did not possess¹, and this did not wholly disappear even with the allowance of such acquisition through a *procurator*, though this is inconsistent with it. It had been doubted whether possession could be acquired through a slave in whom one had only a usufruct, for there was only *possessio iuris*, not possession of the slave, and though this doubt had been overridden in classical law, it still remained for those *in mancipio* or *manu*, as these were not possessed, since they were not *res*. It does not seem to have been felt with *filii familias*. If the subordinate threw a thing away, *possessio* was lost, but mere abandonment of land held by him was thought by some jurists not to involve loss of possession until some third person entered².

As a matter of nomenclature it may be pointed out that *possessio naturalis* means that form of holding which is not protected as possession, that in classical law on the most probable view, *possessio*, standing alone, means such possession as is so protected (interdict possession), and that *possessio civilis* means such possession as has a civil law effect, i.e., is accompanied with the conditions which enable the holder to acquire *dominium* by lapse of time (*usucapio*), i.e., *iusta causa* and *bona fides*. In the Digest, however, the expression *possessio civilis* is commonly applied to interdict possession.

45. Modes of acquisition of *dominium*. These are grouped by Gaius and Justinian³ in two classes, *iure civili* and *iure naturali*, which Justinian explains as being, here, equivalent to *iure gentium*. The distinction intended appears to be between those thought of as peculiar to Rome and those thought of as universally known. In fact, however, it is more nearly expressed, at least for Gaius, as being between those which can in some way be fathered on the XII Tables, and those of later recognition. The modes *iure civili* are those which belong to the ancient, formal, Roman Law. These are discussed first by Gaius, as being the most prominent, if not the most practically important in his day, but most of them have disappeared under Justinian's legislation, and he therefore treats first and with most detail the methods *iure gentium*.

¹ G. 2. 94.² D. 41. 2. 3. 8.³ G. 2. 65; In. 2. 1. 11.

A mode of acquisition which is not stated expressly as such by the institutional writers is acquisition from the State. It cannot well be placed under either of these two heads, which indeed are divisions of the private law, applicable only to transfers *inter privatos*. No rules of form can be laid down, for the State is not bound by such rules. Just as it enforced its claims directly without appealing to its own courts, so it conferred property without reference to the ordinary forms. Naturally the institution is not prominent in the legal texts: only a few cases need mention. Booty captured by the army from the enemy was at the disposal of the General, and was given by him by way of reward, or sold at auction for the benefit of the State and it does not appear that any form was necessary. In like manner, where vacant inheritances, forfeitures for crime, or the property of defaulting debtors to the State had fallen into official hands these were usually sold in a similar way and though there were elaborate rules regulating these proceedings, there can hardly be said to be any form of conveyance. Sales of State lands were made by the ordinary magistrates; but gratuitous assignments, e.g., on the foundation of colonies, carried out at first perhaps by the ordinary magistrates, but in historic times usually by officials specially appointed, required the sanction of a law. The method and the machinery differed in the different cases, but bear no relation to the ordinary modes of conveyance.

Of the *iure civili* methods the most important is

*MANCIPATIO*¹. This process requires the presence of the parties, of five witnesses, adult *cives*, and a balance holder (*libripens*) with the scales. The intending acquirer, holding a piece of metal (*aes*) in one hand and the *res* in the other, says, according to Gaius "*Hunc ego hominem*" (or whatever the *res* was) "*ex iure Quiritium meum esse aio, isque mihi emptus esto hoc aere aeneaque libra.*" Then he strikes the scale with the *aes*, and gives this to the transferor by way of price. Apparently the real price, if there was one, was actually mentioned. It does not appear that the transferor need say anything. Moveables must be on the spot and only so many of several articles could be mancipated at once as could be grasped at once. But land need not be on the spot, and more than one piece of land could be mancipated at once. There could be no

¹ G. I. 119 sqq.; 2. 14a sqq.

express conditions or *dies*, i.e., the effect of the transaction could not be made to depend on some future uncertain event, or postponed to some future date. This is characteristic of all *actus legitimi*. We are told, however, by Justinian, that, on transfer under sale, there was a rule referable to the XII Tables, that ownership did not pass till the price was paid, unless credit was expressly agreed or security given for the price. But there is no trace of this rule as applicable to *mancipatio* in classical texts, though there is at any rate soon after classical times for *traditio*. Either for this purpose the *aes* was taken as the price, which however is difficult to reconcile with the fact, for which there is evidence, that the actual price was stated, or, more probably, the rule (which Justinian also attributes to the *ius gentium*) applied only to *traditio*, and the rule of the XII Tables was only that there was in *mancipatio* no liability for defect of title (*actio auctoritatis*) unless the price was paid.

Mancipatio did not include *traditio*. No doubt the *res* would commonly be handed over, but the ownership passed whether the possession was transferred or not. The witnesses are sometimes said to represent the five Servian classes, but the evidence for this is rather flimsy. The form presents some difficulties of logic. Thus the ownership is asserted when it certainly has not yet passed, for the symbolic act of purchase has not yet taken place. This is explained on the ground that the whole transaction must be viewed as a whole, and also in other ways, e.g., that the form which is plainly in two parts consists of an original part and an accretion, though opinion is divided as to which is which. It is fairly clear that the process was originally designed for moveables and only later extended to land, evidence, perhaps, of the later origin of private ownership in the latter.

As we see it the delivery of the *aes* is a mere fiction of payment, but doubtless there was a time, before coined money was invented, when the actual price was weighed over. It is clear that in this fictitious form it is as old as the XII Tables but it is impossible to say when it originated.

The XII Tables contain a clause to the effect that in *mancipatio* "*uti lingua nuncupassit, ita ius esto.*" This is sometimes held to mean that all sorts of agreements might be embodied in the *mancipatio* (*leges mancipii*) and would be binding. But there seems

no trace of this, and as the best known of these subsidiary agreements, *pactum fiduciae*, was not an integral part of the *mancipatio*, but accompanied it, it is more probable that these words merely mean that the express declaration as to what was transferred was binding, e.g., the express reservation of a right of way to the vendor in the *mancipatio* would effectively create the right.

As *mancipatio* was an act in the *commercium*, it was open only to those who shared this right, i.e., to *cives* and those Latins or peregrines who had received the privilege. Subordinate members of the *familia* could represent their *paterfamilias*, even, probably, slaves, though this is disputed and of course the subordinate could not alienate unless authorised.

Mancipatio was the proper and usual form of transfer for *res Mancipi*, *traditio* of which, as we have seen, gave only bonitary ownership. For *res nec Mancipi* it seems probable that it was unavailable, void if there was no *traditio*, superfluous if there was, and this notwithstanding that it was used as a form of will for transfer of a whole estate, which would normally include *res nec Mancipi*. It was also used for the transfer of some rights, rustic praedial servitudes which were not *res corporales*, and even, as in the case of sale of a son, for what were not *res* at all.

Res Mancipi were Italic land, slaves, beasts of draught or burden and rustic servitudes, perhaps only the most ancient of these (*iter, actus, via, aquaeductus*). It was disputed among the schools whether beasts were *res Mancipi* at birth or only after they were in training, the Sabinians holding the former, the Proculians the latter view. The list is apparently made up of those things which were permanent features of a rustic holding, in primitive times, when most holdings were rustic. Hence valuable things, jewels, etc., which belong to a later stage of civilisation were not in the list, though there are recorded cases in non-legal texts of the actual use of *mancipatio* in connexion with them. Even elephants and camels, though the Romans became accustomed to them as beasts of burden were not added to the list of *res Mancipi*.

Mancipatio was used for other purposes than for transfer of property. We have already considered its use in *adoptio* and *emancipatio*, and in a modified form in *coemptio*¹. Certain servitudes, which are rights less than ownership, are, as we have just

¹ *Ante*, § 26.

seen, in the list of *res Mancipi*, and the will of classical law was effected by a *mancipatio*, again in a modified form¹.

Mancipatio seems to have gone out of use for moveables early in the fourth century. For land it seems to have remained longer in use, and an enactment of A.D. 355² seems to have been understood, at least in the West, as requiring *mancipatio* for all gratuitous alienation of land. But there are also signs that the actual formalities were not gone through: it sufficed to describe the transaction, in writing, as based on a *mancipatio*, and it is probable that *traditio* was also required. In any case *mancipatio* has disappeared altogether under Justinian, who abolished the distinction between *res Mancipi* and *nec Mancipi*.

46. *CESSIO IN IURE*³. This was a process modelled in form on an actual action for the recovery of property, under the early system of procedure (*legis actio*). The parties being before the magistrate, with the *res*, or in some cases a part of it, and in that of land, a turf, as a symbol, the intended transferee formally claims it in words exactly like the first clause of a *mancipatio*: "*Hunc ego hominem meum esse aio ex iure Quiritium.*" The transferor, instead of making a corresponding counterclaim as he would in actual litigation, on being asked by the Praetor whether he claims the *res*, either answers "No," or is silent. The magistrate then makes a formal *addictio* of the *res* to the claimant, and it is now his property. This *addictio*, the formal declaration that the *res* is the property of the claimant does not occur in an actual litigation. The whole process looks like a piece of fictitious or collusive litigation, and some of its rules are clearly due to the fact that it is in form a *legis actio*. But the presence of forms which do not occur in actual litigation has led to the view that it was not essentially litigation, and that these differences of form are expressly designed to emphasise this fact. It has therefore been suggested that it is an act of conveyance by magisterial authority, or, perhaps, an official confirmation of an act of conveyance by the parties. The matter is controversial: in fact the different applications of the process have peculiarities and special rules which are difficult to harmonise with any single view of its character. A possible view is that its original character is that of collusive litigation, but in course of time its conveyancing

¹ *Post*, § 65.

² C. Th. 8. 12. 7.

³ G. 2. 24.

aspect became more prominent, and led here and there to the development of special rules.

To the fact that it had the form of litigation is due the rule that no person could utilise it who could not take part in a *legis actio*. Thus a *filiusfamilias* or a slave could not be a party to a *cessio in iure*. The process was of course not open to any but those who shared in the *commercium*. As it was in form a claim at law, and such claims are necessarily immediate and unconditional, and also because it was an *actus legitimus*, it could not be subject to condition or to *dies*, postponement of operation.

Though it appears among the modes of transfer of specific things, it does not seem to have been much used for this purpose. Gaius tells us¹ that for *res Mancipi* it was rarely used, as *mancipatio* was more convenient, and, for *res nec Mancipi*, *traditio* was more simple still. Its real importance is for the transfer of other than physical things. There were many such applications. Manumission *vindicta* was essentially *cessio in iure*. So was the last stage in *adoptio*. The transfer of *tutela* of a woman by a *legitimus tutor* (*tutela cessicia*) was by *cessio in iure*. Urban servitudes and usufruct were ordinarily created *inter vivos*, and released, in this way². In some cases a person entitled on intestacy could transfer the *hereditas*, before acceptance, by *cessio in iure*. Little is known of the special forms for each case, but some differences of form and peculiarities of effect which are recorded add to the difficulty, above mentioned, of determining exactly how the Romans analysed the process.

We are told that *cessio in iure* is confirmed by the XII Tables³, but this may mean no more than that it is based on the *legis actio*, which is treated in detail in the Tables. In any case it is no doubt considerably less ancient than *mancipatio*. It continued in use as a mode of transfer of *res* throughout the classical age, the latest certain reference to it being in an enactment of Diocletian of A.D. 293. But it was never actually abolished and it may have lasted considerably longer. For the law of persons it certainly lasted much longer. The last stage in *adoptio* was at least nominally by *cessio in iure* till Justinian altered the form. And in *manumissio vindicta* it was not abolished even by Justinian, though it was much simplified in form.

¹ G. 2. 25.

² *Post*, § 59.

³ V. F. 50.

47. *USUCAPIO*¹. This is acquisition of *dominium* by possession for a certain time. It dates at least from the XII Tables, which provide in effect that *usus* of land for two years or of other things for one year shall give *dominium*. It was thus a civil mode of acquisition, applicable, says Gaius, where property has been received from a non-owner. But it applied to some other cases, to the receiver of a *res Mancipi* by *traditio* from the owner, to a praetorian successor (*bonorum possessor*), to the *bonorum emptor* in bankruptcy and in fact to all cases of "bonitary ownership."

The possession must have been continuous. It was not enough that the real owner had been out of possession: the claimant must have actually possessed for the whole of the time. If he lost possession while the time was running, and regained it after an interval, he could not add the times together: the running of the time must begin again. The possession involved is, in general, the same as that already discussed as entitling to interdict possession, but as some other factors were required besides possession, not everyone who had interdictal possession was *in via usucapiendi*. *Possessio* coupled with the other factors which enabled the holder to usucapt was known in classical law as *possessio civilis*.

Interruption of possession was called *Usurpatio*, and was either *naturalis*, mere loss of actual possession, a matter of fact not always easy to define, or *civilis*, which occurred when any person made a claim at law to the *res*. In classical law, joinder of issue in the suit (*litis contestatio*) did not in strictness constitute *usurpatio*, but even though *dominium* supervened before judgment, as the *iudex* was bound to decide, in general, by the facts at *litis contestatio*, the result was much the same as if it had. *Litis contestatio* seems to have amounted to *usurpatio* under Justinian, but it may have occurred at an earlier stage in the proceedings. Whichever the form of *usurpatio* it had the effect of obliterating the previous possession for the purpose of *usucapio* altogether.

Besides possession *usucapio* required initial *bona fides*: the possession must have begun in good faith, which practically means that the holder, when he received the thing, must have believed that he had the right to hold it for himself. Thus a pledgee, though he has a perfect right to hold the thing and has *possessio*, knows that it is not his own and thus cannot usucapt it. Thus in

¹ G. 2. 42 sqq.; In. 2. 6.

the typical case, that of receiving from a non-owner, *bona fides* is essentially mistake, and this must be mistake of fact—an error of law would not suffice. Every one is bound to know the law. Thus if I acquired a piece of land from a slave believing that his master had authorised the alienation, though he had not, I could usucapt; but if my mistake was that I thought slaves had in law a power of alienation, I could not. On the other hand it is not always mistake: there is no question of mistake in the various forms of bonitary ownership.

The *bona fides* must exist at the taking: it is indifferent that the holder afterwards learns that he is not entitled. In two cases, however, the requirement was more strict. Where the taking was based on sale, probably a common case, there must be *bona fides* both at the time of the bargain and at that of the transfer¹, a rule probably based on the fact that early sales were by *mancipatio* and the two events were contemporaneous. Where it was based on *donatio*, the *bona fides* must persist throughout the period of *usucapio*, but Justinian abolished this rule². The rule requiring good faith at the *initium possessionis* had an important effect where a man's possession was interrupted and he again acquired possession, having, however, learnt in the meantime that his title was not good. He could now not usucapt at all for his possession was a new one and its *initium* was not in good faith. The rules of *accessio possessionum*³ also illustrate this point. If a man died while usucapting, and his *heres* actually got possession of the thing, he could add the two periods together: he stepped into his ancestor's position and the two possessions were treated as one. The fact that the *heres* knew of the defect in title was immaterial. But a buyer or legatee or the like did not step into his predecessor's shoes in the same way. He could not, in earlier classical law, add his predecessor's time to his own, though he could usucapt on his own account if he had *bona fides* at the time of taking. At a later period, perhaps not till post-classical times, he was allowed (the rule was borrowed from *longi temporis praescriptio*) to add the two times together. But they were still two possessions, and thus the rule remained that he must himself have been in good faith when he took possession.

Bona fides was presumed, i.e., had not to be proved, though, of course, it might be disproved.

¹ D. 41. 4. 2. pr.

² C. 7. 31. 1. 3.

³ D. 41. 3. 14.

There were a few cases in which *bona fides* was not needed¹. The most important of these, for classical law, is *usucapio lucrativa pro herede*. If a *hereditas* was not yet accepted (or indeed if the *heres* had not yet taken possession of the particular thing) it was open to anyone to seize property belonging to it and to acquire it by one year's possession, even if it was land, and without good faith. The reason says Gaius, for this unjust-looking rule was that it put pressure on the *heres* to accept promptly so that any one having a claim on the estate should be able to proceed. As *sui heredes* and *necessarii heredes* were *heredes* at once without acceptance, there was no such right where these existed. The rule that land could be acquired in one year is based on the curious reasoning that as a *hereditas* is not land, *à fortiori*, what is only part of a *hereditas* also comes under "other things." The rule practically disappeared under Hadrian who enacted that such usucapion could be rescinded. There is *usucapio pro herede* in later law, but this refers only to such cases as that of a *heres* mistaking what belongs to someone else for part of the *hereditas*. Another case is *usureceptio ex fiducia*. Where a thing was transferred under a trust for its restoration in certain events (*fiducia*) either to a friend (*cum amico*) or to a creditor by way of mortgage (*cum creditore*), the old owner could reacquire it by possessing it for a year, without *bona fides*, provided in the last case that he did not hold it by hiring or favour (*precarium*) from the creditor, or the debt had been paid. *Usureceptio ex praediatūra* is a somewhat similar case. Property lawfully taken and sold by the State to a *praediator* could be reacquired by the old owner by possession for the ordinary period of *usucapio*, without good faith. Nothing is said about recoupment. In this case and that of the creditor the rule seems a wanton injustice, but its unknown early history would probably explain the matter. *Usucapio ex Rutiliana constitutione* is a rule that where a man had bought and paid for a woman's property, but the transfer was without the *auctoritas* of her tutor, he could usucapt it, though he must obviously know that he was not entitled. But this did no injustice, and indeed it could be prevented by repayment of the price.

It should be added that the general requirement of *bona fides* and that of *iusta causa*, now to be considered, are generally,

¹ G. 2. 52 sqq.

though not universally, held to be no part of the original scheme of the XII Tables, but to have been added at a later time to make more justifiable the extremely short periods. These were reasonable when the total area of the State was very small, but hardly in a wide territory. The above mentioned exceptions are on this view not special privileges invented, but survivals.

48. There must also be *Iusta Causa* (or *Iustus Titulus*). This means that the taking must have been the result of some event or dealing which ordinarily is a basis of acquisition, sale, gift, legacy, exchange and so forth. It would normally be a binding transaction, but a pact to give sufficed, and a praetorian decree was a good *causa*, provided it gave actual *possessio*: in some cases it gave only custody.

The *causa* must be real: putative *causa* did not suffice. There must have been, underlying the transfer, a real sale or gift or legacy, etc. The mere belief that there had been such a transaction was not enough. This differentiates the *causa* or *titulus* of *usucapio* from the *causa* of *traditio*. There too there must have been a *iusta causa*, but a putative *causa* sufficed. Thus if *A* hands over to *B* a thing of his which is supposed to be due under a sale, but in fact the sale was of another thing, the ownership would pass, though no doubt there would be an *actio in personam* for recovery of the thing. But if in fact the thing did not belong to *A*, *B* would not usucapt, though they were both in good faith, since there was no real *iusta causa*¹. Difficulties might and in fact did arise on the question whether in a given case there was or was not a real *iusta causa*. Further, there are indications of exceptions to the rule requiring a real *causa*. There may have been differences of opinion, but it is probable that the rule was as is above stated in all cases but sale, that in sale some jurists held that a putative *causa* sufficed and that the rule ultimately reached was that in sale a putative *causa* sufficed if, on the facts, the error was one into which a reasonably careful man might have fallen. It is not necessary to hold that all *causae* had the same rules: we have just seen that there were differences as to *bona fides*.

The *causae* were numerous: many, but not all, are enumerated in the Digest. Most of them involve mutuality, or at least some direct relation between the two parties, e.g., *usucapio pro empto*,

¹ D. 41. 4. 2. 6.

legato, donato, soluto. But *usucapio pro derelicto* did not. Here there must have been an abandonment of the thing, or there was no *causa*: belief that it had been abandoned did not suffice¹. On the other hand the abandonment must have been by someone who was not the owner, otherwise the taker would have acquired immediately by *occupatio* and there would have been no need of *usucapio*. A *causa* which appears in the Digest is *pro suo*, which is sometimes used to cover nearly all cases, but has a narrower significance. Thus if *dos* is given before a marriage and a *res aliena* happens to be included, this may be usucapted. But it will not be *pro dote* so long as there is as yet no marriage, there being no *dos* till then: it will be *pro suo*.

There are other requirements of *usucapio*. Thus the person concerned must be capable of *usucapio*. It was a civil notion, and thus applied only where the receiver was one who had *commercium*, not, e.g., an ordinary *peregrinus*. And the *res* must be susceptible of *dominium*: there was no *usucapio* of *res sacrae* or *religiosae*, or, in classical law, of provincial land. Further, certain owners were protected by law. *Res fisci* or *Caesaris* could not be usucapted, except parts of a vacant *hereditas* not yet reported to the *fiscus*. *Res Mancipi* of a woman in agnatic *tutela* (so long as this lasted) could not be usucapted, except subject to the *constitutio Rutiliana*. Nor could land in a *dos*, or of a *pupillus* (or in later law of a person in *cura*), or, under Justinian, land subject to a religious or charitable trust.

A very important restriction is that the *res* must not be *vitiosa*. The only cases of *vitium* important in private law are *res furtivae* and *vi possessae*. By a rule attributed to the XII Tables and to an early *l. Atinia*², stolen goods could not be usucapted into whatever hands they fell, and legislation, late in the Republic, described by Gaius and Justinian as the *l. Iulia et Plautia*, applied the rule to things taken by force. The *vitium* was purged so soon as the *res* had returned to its owner, and he knew of this. There were detailed rules as to what amounted to such return, into which we need not go. Gaius remarks that as moveables in the wrong hands have usually been dishonestly dealt with by someone (and the notion of theft in the Empire was wide), while the notion of theft did not apply to land, *usucapio* of moveables was less common

¹ D. 41. 7. 6.

² G. 2. 45; In. 2. 6. 2.

than that of land. But he shews cases in which it might occur, e.g., that of the *heres* who sells what had been lent to the deceased thinking it part of the estate.

Usucapio of land did not of itself destroy any usufruct or servitude over the land, though, in so far as these were not being enjoyed they might themselves, as we shall see, be lost by lapse of time. And it did not affect the rights of a creditor holding a hypothec.

It should be added that *usucapio* could be rescinded by an action brought within one year after it was first possible, where the person against whom time was running could not sue by reason of absence on State service, or from some other cause had been unable to act, or where the absence of the other party had made it impossible to sue him¹.

The foregoing are the main rules of *usucapio* in classical law: we shall see that there was modification in important respects under Justinian.

49. *Longi temporis praescriptio*. We have seen that *usucapio* had a restricted scope, as to both the persons and the things to which it applied. *Longi temporis praescriptio* was a system introduced by imperial enactments, apparently about the end of the second century, by which long enjoyment was protected in some cases to which *usucapio* did not apply. Its main field seems to have been the holding of provincial land, and no doubt the holding of any land by peregrines. But as it had some effects which *usucapio* had not, it may have been used in other cases. The rules as to *accessio temporum* were as in *usucapio*, by which in fact they were borrowed from the system now under discussion. The rules as to *bona fides*, *iusta causa* and *vitium* seem to have been the same. In other respects there were great differences. The time required was much longer and thus more reasonable: it is defined as being ten years if the parties were *praesentes*, twenty years *inter absentes*, which Justinian explains as meaning domiciled in the same or in different provinces², in relation to which it must be remembered that the *provincia* of that age was usually much smaller than the *provincia* of the classical law. And the main effect of *praescriptio*, at any rate at first, was very different. *Usucapio* was positive or acquisitive, i.e., it not only destroyed the previous owner's right, but it created

¹ In. 4. 6. 5.

² C. 7. 33. 12.

a new ownership in the *usucapiens*. *Praescriptio* was merely negative or extinctive: it was available only as a defence. If the old owner claimed the land, the long possession set up would bar his claim, but it did not give the holder a title to the land. If, from any cause, he lost possession, he could not claim the property as his own from the adverse holder, even by the modified remedy open to owners of provincial land (the true *vindicatio* was of course barred on other grounds: there was no *dominium* of *solum provinciale*). In appropriate cases he could no doubt recover possession by the interdictal machinery, but this was far from an adequate protection. But at some time before Justinian, probably long before, apparently by a strained interpretation of *veteres leges* (though we know nothing of the process of interpretation or of the identity of the *leges*¹), positive remedies were found, so that the holder, when the time had run, could regain possession from anyone by an action.

There were other minor differences. An existing hypothec would be destroyed if, when possession began, the possessor did not know of it. And, apparently, *litis contestatio* was *usurpatio*, i.e., interrupted the *praescriptio*.

System under Justinian. As in his time all inferior modes of ownership were abolished, the way was clear for a fusion of the two systems. Indeed if he had not legislated expressly on the matter, the old law would have applied universally, but in fact he recast the old system. He fixed the time necessary as three years for moveables, and ten or twenty, according as the parties were *praesentes* or not, for immoveables. The effect was fully acquisitive. *Litis contestatio* seems to have been a *usurpatio*, and in other respects the rules were as in *longi temporis praescriptio*. The name *usucapio* seems to have been more commonly applied to the case of moveables.

*Longissimi temporis praescriptio*². Enactments early in the fourth century gave extinctive protection after forty years' possession whatever its origin. Theodosius, early in the fifth century, barred all actions in ordinary cases after thirty years, subject to protection for *impuberes* only. This is, in effect, a thirty years *praescriptio*, without special requirements, but the principle is different, since it seems to be absence of enjoyment by the owner, and not long possession by the defendant, which bars the claim. In some cases,

¹ C. 7. 39. 8.

² C. Th. 4. 11. 2.

not certainly known, the limit of time was forty years. Justinian added a further rule that if there had been possession for the period of limitation, begun in good faith, the effect was acquisitive.

Special rules were applied in the case of sales by authority of the *Fiscus*¹, resulting, e.g., from forfeiture or from absence of claims to a vacant *hereditas*. Property of a third party might chance to be included by mistake and M. Aurelius provided that five years' possession by the buyer should bar the old owner, whatever defects as to *bona fides* or *vitium* there might be. Zeno gave any acquirer from the *Fiscus* a title at once, and allowed the old owner to claim compensation from the *Fiscus* within four years. Justinian extended the rule to all alienations by officials of his or the Empress's household.

50. *ADIUDICATIO*². This mode of transfer, like *cessio in iure*, involves litigation: it takes effect as part of a judicial process. But, unlike *cessio in iure*, it is actual litigation. There were three actions, the Divisory Actions, in which the *iudex* had a special function. In ordinary cases it was not his business to create rights, but only to decide what the rights of the parties were. But in the action for division of property held in common (*iudicium communi dividundo*) and in the more specialised action for division of a *hereditas* among those entitled (*iudicium familiae erciscundae*), he had to allot the property among the claimants, thus making each party become owner of a specific part separately, instead of continuing to own an undivided share in the whole. And in the action for adjustment of boundaries (*iudicium finium regundorum*), though normally his function was simply to decide where the boundaries really were, he was empowered, where this was convenient, to establish a better boundary by a process of give and take, allotting to *A* what had been part of *B*'s property, and *vice versa*. He might also have to create easements, rights of way, etc., and even usufructs, in order to deal fairly in these actions. The process was a formal *adiudicatio* which constituted the title of the party and was thus a mode of acquisition. Equal division might indeed be impossible. A horse and cart cannot be divided equally—a horse cannot be divided at all. In such cases he would have to divide as best he could, and order equalising payments. But these orders were no part of the *adiudicatio*: they were simply *condemnationes*,

¹ In. 2. 6. 14.

² U. 19. 16; In. 4. 17. 6. 7.

like any other judgments for a sum of money. As it was litigation, a slave, however authorised, could have no part in this mode of conveyance.

In classical law, if the action was a *iudicium legitimum*, *adiudicatio* gave civil ownership (*dominium*), if it was a *iudicium imperio continens* it gave only praetorian ownership ripening of course by *usucapio*. But this inferiority, as we have seen, no longer existed under Justinian, and, indeed, *iudicia legitima* were long since obsolete.

*IUS ACCRESCENDI*¹. This expression will be found to have many applications. Wherever there are several jointly interested, and from the cesser of the right of one his share vests in the other or others, this is a case of *ius accrescendi*. But it is here more specially applied to a rule of classical law, obsolete under Justinian, by which, if one of common owners of a slave freed him by formal process the effect was merely to transfer his rights to the other owner or owners. If the manumission was informal, it was a nullity. Under Justinian the slave was free, but the other owners had to be compensated, so that this mode of transfer was obsolete.

LEX. Ulpian tells us of a few cases, all under wills, in which the property may be said to be acquired *lege*. The cases he mentions are legacy, certain cases under the *ll. caducariae*, and, in a text in the Digest, *hereditas* itself². The name can of course be applied to any case in which a statute governs the destination of property, such as *usucapio*, treasure trove, etc., but it is not so used in the texts.

Justinian mentions as a civil mode of acquisition *donatio*, but as this is not normally a mode of acquisition, but only a *causa adquirendi*, it will be more conveniently considered elsewhere.

¹ U. 1. 18; P. 4. 12. 1.

² U. 19. 17; D. 50. 16. 130.

CHAPTER VII

THINGS. PROPERTY. MODES OF ACQUISITION

IURE NATURALI

51. The modes of acquisition of property which we have now to consider are those described as *iure gentium* or *naturali*, those in fact which are not part of the old formal law and are thought of as universal. This description expresses merely the supposed origin of these methods and has nothing to do with their effect. A *iure gentium* mode of transfer gives quiritary ownership, except indeed where it is applied to *res Mancipi*. Here, certainly *traditio*, and possibly *occupatio*, give only bonitary ownership in classical law.

The most common and most important of all these modes of transfer is

*TRADITIO*¹. This may be described as transfer of ownership by transfer of actual control, with the intent on the one hand to transfer the ownership and on the other to receive it. In addition to this we are told that there must be a *iusta causa*. But, here, it is clear on many texts, that a putative *causa* sufficed: the belief that there was a *causa* was enough to found a valid *traditio*. Thus if *A* handed over a thing to *B*, under the mistaken impression that it was due under a sale, the *traditio* was effective to transfer ownership, though there would be a personal action (*condictio indebiti*) to recover the property as not having been due. Thus error as to the existence of the *causa* or as to its nature, where, e.g., the two parties had different *causae* in view, one thinking it was a sale and the other that it was a gift, would not prevent the ownership from passing, and the same principle would apply where there was in fact a *causa*, such as sale, but it did not apply to the thing in question. But if the transferor handed over the slave Stichus, thinking he was the slave Eros, there was no valid *traditio*², though if he had handed over Stichus thinking he was due, while in fact Eros was due, the *traditio* was good. Error of identity in the thing given was fatal: error in *causa* was not. Similarly, though there need be no specific transferee (the throwing of coin to a mob was a *traditio incertae personae*), a *traditio* to *A* under the impression

¹ In. 2. 1. 40 sqq.

² See D. 41. 2. 34. pr.

that he was *B*, to whom the thing was due, was invalid. But there is some conflict in the texts on the subject of error, especially in cases of *traditio* by one who, by mistake, delivers as from his principal, a thing which is really his own.

Where the transaction was accompanied by fraud (*dolus*), if this had induced such an error as, on the foregoing principles, would vitiate the *traditio*, it was of course void, but apart from this it was valid, though there were remedies which will be more conveniently considered under the head of Delict. Similarly where the consent was induced by serious threats (*metus*) the *traditio* was valid, though there were remedies by which the matter could be adjusted¹.

Delivery of control is not quite a simple matter. It is not necessarily delivery from hand to hand: to put the thing in the transferee's house with his knowledge would be equally effective. To put it in any place appointed by him would suffice. These are obvious enough, but there were other modes of *traditio*. The thing might be already held by the transferee before the transaction, e.g., a thing hired by me might be sold to me. Here the agreement that I was to have it as owner was a good *traditio brevi manu*. Having been a mere *detentor*, I now became *possessor*, and thereby owner. A converse proceeding has acquired the name of *constitutum possessorium*. If an owner in possession sold the land agreeing to hold it as tenant of the vendee, the making of this arrangement was a valid *traditio*: the *possessio* and with it the ownership, shifted to the vendee without any actual displacement. *Traditio longa manu* occurs where the *res* is pointed out to the transferee, in such circumstances that it is freely accessible, and he is told that he can take it. The name approximate *traditio* has been applied to delivery by giving the means of control, such as the key of the store in which the goods are. On principle, this had to be done on the spot, so that the control was immediately effective. Some texts do not state this requirement² and there is reason to think that the abandonment of it in later law, perhaps before Justinian, was the first step towards a system which, in Justinian's legislation, is found applied especially to land, but also to moveables, under which delivery of documents of title was treated as equivalent to *traditio*.

¹ *Post*, § 130.

² *In. 2. 1. 45*; *D. 41. 1. 9. 6.*

Since *traditio* was informal and *iuris gentium*, it was open to anyone who could take part in legal transactions at all, though, as consent was needed, a person incapable of consent, such as a *furiosus*, could not engage in it. It was not an *actus legitimus*, and thus from, at latest, the first century of our era, it was possible for a *procurator* to transfer or receive *possessio*, and, not long after, the inference was drawn that, if the necessary consent of the principal was present, the transfer of *possessio* would transfer ownership. In the time of Gaius a *procurator* was one who managed a man's business affairs, a general agent, but in course of time the term became more loosely applied, and in the time of Justinian, and probably long before, any freeman, duly authorised, could transfer or acquire for one in this way. So too, as it was not an *actus legitimus* there was no bar to conditions or suspension of operation till some future day (*dies*) and these will be found to be prominent in the law of sale. On the other hand it was impossible to attach a *fiducia* to *traditio* in classical law. The point does not arise for Justinian's law, as *fiducia* was abolished. Under Justinian, but probably not in classical law, a servitude, such as a right of way, could be reserved to the transferor in a *traditio*, and the same is true of reservation of a usufruct by *deductio*.

As we have seen¹ *traditio* of a *res mancipi* gave only "bonitary ownership" with praetorian remedies (*actio Publiciana*, *exceptio rei venditae et traditae*) in classical law, but this distinction is gone under Justinian.

Justinian tells us that in *traditio* under a sale, ownership did not pass till the price was paid, unless credit was expressly given or security provided. He attributes this rule both to the XII Tables and to the *ius gentium*. The reference to the XII Tables is probably a misunderstanding. Gaius knows nothing of the rule, but it is perhaps hinted at in Paul's *Sententiae*², and is clearly expressed in the later *interpretatio* of this work. It is possible that it is a late classical, or most probably, post-classical, importation from Greek law.

52. All the cases of alienation which we have hitherto considered, except *usucapio* (and *praescriptio*) are cases of voluntary transfer, cases in which the transfer is a transaction, involving the consent of the two parties. We have now to consider a group of modes of

¹ *Ante*, § 43.

² P. 2. 17. 1, 2, 7.

transfer in which, with a partial exception in the case of acquisition of fruits, the transfer is involuntary, as in *usucapio*, and does not involve the consent of a transferor.

*OCCUPATIO*¹. This is the acquisition of a thing previously belonging to no one, by taking possession of it. It will be observed that here there is no question of transfer, voluntary or involuntary: what is acquired had no owner and the acquisition is thus "original," not "derivative."

Not everything which was technically a *res nullius* could be acquired by *occupatio*. *Res sacrae, sanctae*, and *religiosae*, and *servi poenae* could not be so acquired. A thing left by legacy *per vindicationem*, under a condition not yet satisfied was, on the Proculian view, a *res nullius*, but it was not on that account open to *occupatio*. We are told that *occupatio* applied to *praeda*, war booty, but this was ordinarily at the disposal of the general, so that the State is the only possible *occupans*. There might however be private *occupatio* of enemy property found in Roman territory, and by private raiders in States with which Rome had no friendly relations. There might also, we are told, be *occupatio* of *res derelictae*, things abandoned by their owner. The *occupans* must have known that the property was abandoned, and thus be in good faith: there could not, indeed, be the necessary intent to acquire apart from the belief that the thing was susceptible of acquisition. Thus one who meant to steal did not become owner, though the *res* had in fact no owner². The Proculians held, though the view did not prevail, that *derelictio* was not complete till another person had taken the thing. On this view the taking of an abandoned thing might be construed as the last step in a *translatio incertae personae*, and it is in fact so handled in some texts. But this is inconsistent with the view which prevailed that a thing thrown away became a *res nullius*: there could be no *translatio* of such a thing. The abandonment must be a renunciation of ownership: things thrown overboard to lighten a ship in danger were not open to *occupatio*, since they would be recovered if possible. It may be that where the *res derelicta* was a *res mancipi* the *occupans* acquired only bonitary ownership, but the absence of classical texts on the matter makes this uncertain.

The most important field of *occupatio* (for things of any value

¹ G. 2. 66 sqq.; In. 2. 1. 11 sqq.

² D. 41. 7. 2. pr.

are not usually thrown away) is in relation to things which have not previously had an owner. We learn that there may be *occupatio* of stones, gems, etc., picked up on the seashore, and islands arising in the sea, *quod raro accidit*. More important than these is the case of wild animals, discussed at length in the Institutes. Such things, beasts, game and the like, were acquired by capture, but only by complete capture: a wounded beast was not acquired, nor even a killed beast, till he was actually possessed. Moreover the ownership of such things lasted only so long as the effective control was retained. If they escaped, they were no longer owned, so soon as the chance of recovering them was not materially greater than that of capturing such a thing *de novo*. This was so far modified in the case of bees, pigeons and the like that the ownership of these was retained so long as they retained the habit of returning to their quarters, *animus revertendi*. The rule that of wild animals the ownership lasted only so long as the control did is not easily explained. It is in conflict with ordinary principle, for one does not commonly cease to own a thing by ceasing to possess it. It may be that the rule dates from a time when the right in such things was not thought of as ownership, when there was no *vindicatio* of them, though the law of theft would penalise interference with the holder. However this may be, the case was one of ownership in historical times and the rule had curious results. If the wild animal escaped, the former owner was no longer responsible for damage it did: it was not his beast. Thus there was no obligation to keep it securely. This state of things is evidence of the antiquity of the rule and it was itself so unreasonable that it was early modified by the Ædiles and later by legislation and practice¹.

53. *ACCESSIO*². This may be described as the acquisition of a thing by its incorporation into something of ours. It has so many applications that a discussion of it necessarily occupies a space disproportionate to its practical importance.

Accessio of moveables to moveables. If the union of the two elements is such that separation is practicable (*commixtio*), there is no *accessio*. If it was done by consent, the mixture is owned in common: if it was not by consent there is no change of ownership. and the act may be *furtum*. If the union is such that separation is not practicable (*confusio*) there is equally no *accessio*. Whether

¹ *Post*, § 132.

² *G.* 2. 73 sqq.; *In.* 2. 1. 26 sqq.

it was by consent or not ownership is common. But here there is an exception. If, of the two elements, one is merely accessory to the other there is *accessio*. The ownership of the accessory part merges in the ownership of the principal thing. The line between what is separable and what is not will not be the same in all ages. Two things soldered together were regarded as separable (*plumbatura*): two things welded together (*ferruminatio*) were not. For the Romans, *aes* and silver were separable, silver and gold were not. The question whether in any given case one element is an accessory is a question of fact. If I use your dye to dye my wool, the dye is accessory. If I use your gold to write lettering on my tablets, the lettering is accessory; but the decision is reversed where I paint a picture on your canvas, with my materials; the reason assigned by Justinian being that of relative value. The reason seems to be his, though the rule is not, for it is in Gaius, but it is clear that not all jurists accepted it. Where I weave your wool into my coat, this is an accessory (*textura*) and it is commonly held to be a case of *accessio*, but the texts are not clear and it has been maintained that it was regarded as separable. Many attempts have been made to find a principle on which to determine whether the addition is an accessory or not. Perhaps the best is whether the thing resulting from, or made up of, the two elements would retain its identity as the same thing, if the added element were removed. But even with this test the decision would not always be easy.

These rules determine only the question of ownership: there remains the question of compensation, which, though it belongs to the law of *obligatio*, must, to avoid misconception, be considered here. If the fusion was by the loser, with knowledge of the facts, he had no claim: he was regarded as having given it¹, unless he had done it as a reasonable act of administration on behalf of an owner, whose interest he had protected when he was unable to attend to them himself, in which case he might have an *actio negotiorum gestorum contraria*. If he thought, at the time of the act, that he was owner, he could resist a *vindicatio*, unless he was compensated for his loss, but if he had not still possession, he had no claim. If it was done by the acquirer, in good faith, he must, if he had possession, compensate for the loss, at least in later law:

¹ See D. 41. 1. 7. 12.

if the loser had possession the owner could not vindicate without paying for the added value. If the act was in bad faith, this was *furtum*, and there was *condictio furtiva*, the thief being liable for the highest value of the thing since the theft—whether he still held it or not.

In the case of the painting the rules were peculiar as the texts stand. If the painter possessed, the old owner had what seems to be a *vindicatio utilis* on payment of the *impensum picturae*. If the old owner possesses, the painter, if in good faith, could vindicate subject to *exceptio doli*, if he did not pay the value of the tablet. Thus either could recover from the other¹.

ACCESSIO TO LAND, APART FROM BUILDINGS. What was sown or planted in a man's land was his: *quicquid plantatur solo, solo cedit*. Imperceptible deposit of soil by the action of a river belonged to the owner of the bank on which it fell. An island arising by similar causes, or suddenly, in a river, belonged to the owners on each side to the middle line of the river. These rules seem to express the principle that the soil of the bed is owned to the middle of the stream, and these are accessions to it. Thus the rule does not apply to *agri limitati*, i.e., lands defined by artificial boundaries, as lands assigned by the State commonly were, even though the boundary chanced at some point to coincide with the bank of a stream. But the rule as to *insula nata* is not very old: it was not till classical times that the doctrine of ownership to the middle line, on which the acquisition depended, was itself admitted. On the same principle, if a river changed its bed, the old bed belonged to the owners on each side, while the new bed became public, in the sense that it was subject to rights of public user of the river: the soil belonged to the owners on each side. But a mere temporary inundation had no legal effect. One logical result of these rules is that if a change in the bed caused the river wholly to cover one man's land, this was wholly lost, since there was no adjoining land to which it could attach, so that it did not revert even if the river reverted. The text which tells us this² observes that this strict rule would hardly be enforced, which may be an interpolation. If a solid identifiable piece of land was carried to A's land by the force of a river, it became A's only when trees rooted in it took root in his land.

¹ G. 2. 78; In. 2. 1. 34.

² D. 41. 1. 7. 5.

In most of these cases there is no question of compensation, but where the notion is applicable the rules seem to have been as in the last case.

ACCESSIO TO BUILDINGS. Two cases are discussed.

A builds on his own land with *B*'s materials. The house is the builder's: *superficies solo cedit*. But a subtle distinction is drawn. The materials, though absorbed into the house, are regarded as having a separate existence. The ownership of them, as such, remains in the former owner, subject to the rule of the XII Tables that materials could not be taken out of an existing building¹. If the builder had stolen the materials, the old owner could bring an *actio de tigno iniuncto*, for double damages, and also reclaim the materials when the house came down. If the builder was in good faith, but the materials had in fact been stolen by someone, the old owner could sue by *de tigno iniuncto*, but if he did he could not reclaim the materials at any time. If the whole had been in good faith, there was the right of reclaim, but it is not clear that in classical law there was any other remedy; though there may have been, as there certainly was, in later law, an *actio in factum* for the value of the materials.

B builds with his own materials on *A*'s land. If *B* acted in good faith, and was still in possession, he could resist a *vindicatio*, by *exceptio doli*, unless his expenses were repaid, and if the house fell or was taken down, while in his possession, the materials reverted. Some texts give him the right to remove his addition, if the house is left no worse than before he built, *ius tollendi*¹. But this right which seems in conflict with the rule of the XII Tables, may be an addition by the compilers. If he was in bad faith, if, that is, he knew the land was not his, he could not resist a *vindicatio*, and he had certainly no *ius tollendi* in classical law, though texts shew such a right under Justinian. The principle applied is that he is supposed to have intended a gift: and there is the necessary restriction that, if he built on another's land as a reasonable act of administration on his behalf, e.g., doing urgent repairs in his absence, there was an *actio negotiorum gestorum contraria*. If the owner, *A*, had recovered possession, then, apart from *negotiorum gestorum*, *B*'s only right, even if he was in good faith, seems to have been to claim the materials if the house fell or was taken

¹ D. 6. 1. 38.

down. If he was in bad faith the notion of intent to give was applied. It is of course no more than a legal fiction to penalise a wrongdoer.

54. *SPECIFICATIO*¹. This may be described as acquisition of a new thing by making it, out of materials wholly or partly belonging to another person. We shall deal only with the case in which the materials are wholly another's. There was in classical law a conflict of opinion on this topic. The Sabinians held that there was no acquisition in the matter—the thing made still belonged to the owner of the materials. The Proculians held that it belonged to the man who had brought it into existence. There is, no doubt, under this dispute a philosophical question, whether the essence of a *res* is *substantia* or *forma*, which, for the materialistic lawyers, meant whether a vase is a vase which is made of bronze, or a quantity of bronze which is in the form of a vase. Justinian tells us that there had been a *media sententia* according to which it belonged to the maker if (i) it was irreducible to its former state, and (ii) it really was a *nova species*, where *species* means thing. And this view he adopts as law. Thus raw metal cast into a vase is reducible into the material again and though it is clearly a *nova species* it is not acquired by the maker. If *A* melts down *B*'s vase and makes it into a statue, this is a *nova species*, but is it irreducible and so acquired? If it is thought of as one operation it is, for the original vase cannot be restored. But when it was melted down the material was still *B*'s and in that sense *ad materiam reverti potest*. The case is not discussed.

The exact definition of a *nova species* is difficult: the Romans had hardly defined it to themselves, for they disagreed on the question whether grain thrashed out of the ear was a *nova species*, though the finally accepted view was that it was not. It was merely an article taken out of its wrappings. Moderns have attempted many definitions but all have their difficulties. The most acceptable seems to be that it must be a complete definite manufacture. The mere change of form of the material in the process of manufacture is not enough, e.g., cutting up the wood which is to form a box. But there might be difficulties here. Material partly prepared to form a product may itself, for other purposes, be a finished product. Thus in wine making, the expressed juice (*mustum*), unfermented,

¹ G. 2. 79; In. 2. 1. 25.

is itself a potable fluid. It is doubtful whether it was a *nova species*, though some modern writers hold that it was.

The question whether *bona fides* was necessary to *specificatio* is much disputed. On the whole, in view of the way in which the topic is discussed in connexion with *accessio*, without distinction (and where the material was partly the maker's, it is hard to say whether it is *accessio* or *specificatio*)—the requirement seems unlikely, since it did not exist in that case. But of course the question would be very material on the point of compensation. This is a matter on which we are told very little. Probably the rules were as in *accessio*, but it is possible that where the maker was in good faith and was in possession there was no remedy.

As the thing made was a new thing, the question arises how far it was affected by charges and liabilities affecting the material. We are told that a pledge of the material did not apply to the *nova species*¹ and that a legacy of the material was not a legacy of the thing (but this turns on presumed intent of the testator). A usufruct of the material was destroyed. On the other hand, if the material was *furtiva*, so was the thing. The texts shew that metaphysical considerations, and, no doubt, differences of opinion thereon, underlie these opinions. Where, as in the cases we have considered, the ownership is in a new person, it must be a new ownership; but if the maker was also the owner of the materials, the question arises whether this too was a new ownership and the notions of *specificatio* were applicable. This we shall not deal with.

A further rather speculative question is as to the basis of acquisition. For the Proculians it seems to be a form of *occupatio*, perhaps helped by the notion of reward of labour. The best known modern view on the matter bases acquisition on creation: making a thing which did not exist before.

TREASURE TROVE². Treasure, for the purpose of these rules, is money or some other valuable thing, jewels, trinkets, etc., which have been so long deposited in the soil that all trace of their ownership is lost. It is possible that at first the rules covered only money, but *thesaurus* is clearly wider in classical law, and indeed it is not possible to define its limits. The purpose of the deposit is immaterial: it is not in fact clear that it need have been an intentional deposit at all. In the Republic it seems that such things

¹ D. 13. 7. 18. 3.

² In. 2. 1. 39; D. 41. 1. 31. 1, 63. 1.

were regarded as part of the land, and therefore, on discovery, belonged to its owner. But, very early in the Empire, there appeared a tendency to hold that they belonged to the State, half going to the finder, perhaps as a reward to informers. There was much subsequent legislation. The law laid down by Justinian, based mainly on an enactment of Hadrian is shortly as follows. Treasure found on a man's own land was his: what he found, by accident, on another's, was half his and half the landowner's, the *Fiscus* or *Caesar* or a *civitas* being treated like any other owner. What was found on *solum sacrum* or *religiosum*, which was *res nullius*, the finder, by accident, kept. But though all this is stated in the Institutes as current law, Justinian elsewhere¹ preserves rules which are in some conflict. By an enactment of M. Aurelius and Verus, *divi fratres*, also preserved by Justinian, where the find is by accident on land of any public authority or on *solum religiosum* or *sacrum*, it must be reported to the *Fiscus*, the finder and the *Fiscus* sharing: if it is not duly reported the *Fiscus* takes all. This diminishes the right of the finder in some cases and suppresses that of a *civitas* altogether. And an enactment of A.D. 480, also preserved by him², deprives the finder, on his own land, of any claim, if he used forbidden arts; which indicates the reason why finders, on land not their own, had no right unless the find was accidental. The rule as to the landowner's share is strictly for the owner; usufructuary, pledgee, etc., have no right except as finders. The acquisition is immediate on the finding: each share vests thereby in the person entitled. It is not a question of an obligation.

The question remains: what is the basis of acquisition? For the finder, it is not reward of labour, for the finding must be accidental. The finder, for this purpose, is he who first gets control. This suggests *occupatio*, but the principle is overlaid by legislation. It is sometimes put down to *inventio*, but this seems little more than a label. There is similar difficulty as to the owner's share. It is not, in the Empire, part of the land, or usufructuary would have a usufruct in it. It is sometimes said to be *accessio*, but, if so, it is exceptional: it occurs not by joining but by separation. The view is no doubt suggested by the "accession" of fruits to the owner of the fruit bearing thing, but this is not thought of as acquisition at all. The fact that the matter is governed by express legislation obscures the principle.

¹ D. 49. 14. 3. 10.

² C. 10. 15. 1.

55. ACQUISITION OF FRUITS BY A NON-OWNER¹. The *fructus* of a thing, i.e., its organic and, usually, periodic products, belong on separation, when first they acquire independent existence, to the owner, where he has the right of enjoyment of the thing. For legal purposes other products, ore or sand or lime, taken from the land, are on the same footing. The fruit is a new thing and it is possible to think of the case as one of a new ownership and thus an acquisition. Some modern writers regard it as a case of *accessio*. But if so it is *accessio* in a derivative sense: it is not an accession to the thing, for that occurred before separation. There is in fact no real reason to think the Romans regarded it as a case of acquisition. But there are four cases in which a non-owner acquires the fruits: usufructuary (roughly, a life tenant), *colonus* (tenant farmer), *emphyteuta*, a creation of the late law, who holds a sort of perpetual lease, and a *bona fide possessor*. The first two acquire the fruits only by *fructuum perceptio*, i.e., by actually gathering them in. Till that has been done they are the property of the owner of the thing itself. The second pair acquire by *fructuum separatio*, i.e., the moment these are severed from the parent thing, no matter by whom this is done, even, e.g., if they are cut by a thief. The reason for the distinction seems to be that the *emphyteuta* and the *bona fide possessor* have legal *possessio* of the thing, and therefore of the fruit at the moment of severance. The usufructuary, having only a *res incorporalis*, though he has the actual enjoyment, is not thought of as having *possessio* of the *res* itself, but only what came to be called *possessio iuris*, *quasi-possessio*, and the *colonus* has only detention. Thus in both cases there must be an actual taking of them into possession. What amounts to this is a question of fact: reaping without stacking was enough. Something must be said of each of the cases.

Colonus. His right to the fruits depends on his contract with the *dominus*, i.e., on the consent of the latter. It is in effect a case of *traditio brevi manu*. Hence it follows that if the owner revokes his assent, there is no acquisition, though an action on the contract will of course lie for his breach of it. And if the ownership is transferred, there must be a new assent, tacit or express, by the new owner, who is in no way bound by the contract.

Usufructuary. Though he acquires only by *perceptio*, there is a

¹ In. 2. 1. 35 sqq.

profound difference between him and the *colonus*. His right does not depend on the consent of the *dominus*, but on his usufruct, his right *in rem* in the thing. Thus there is no question of *traditio brevi manu*, and there is no evidence as to the way in which the Romans analysed the acquisition, or whether indeed, they analysed it any further at all.

The usufructuary's right to fruits is subject to one important limitation. Where there is a usufruct of such a thing as a flock of sheep, it is, as we shall see¹, the duty of the usufructuary to keep up the numbers of the flock. This will ordinarily be done by replacing those which die or are disposed of, from the accruing young. This right of the owner to replacement (*summissio*, *summittere*) might be construed in either of two ways. It might be thought of as an obligation to replace, like the other obligations of the usufructuary, for which the owner usually holds security. On this view, if there was a shortage of the flock, lambs born belonged to the usufructuary in any case, but he would have to convey the necessary replacements to the *dominus*, by adding them to the flock, a case of *traditio*, as it would put them into the *possessio* of the *dominus*. Or it might be held that where there is a shortage, lambs born belong, *ipso facto*, to the flock, i.e., to the *dominus*, and if more are born than are needed to fill the vacancies, the ownership of all is in suspense, till an actual *summissio* is made. Both views appear in the texts², but the latter is evidently that which prevailed. The suspense applies, however, only to those born during an actual shortage. Those born before are the property of the usufructuary, though there is nothing to prevent his using them to make up the deficiency.

It is important to distinguish between *fructus*, properly so called, and what are sometimes called *fructus civiles*. The point might arise in any of the four cases we are considering, but it is of special importance in usufruct. Instead of himself exploiting the usufruct, it was not unusual for the usufructuary to sell or lease the enjoyment of it. In that case he took, instead of the fruits, the price or the rent, and profits of this kind are the so-called *fructus civiles*. But to these the notion of *fructuum perceptio* is not applicable. They were acquired by the payment to him, normally a *traditio*. This *traditio* made the rents or similar

¹ *Post*, § 61.

² D. 7. 1. 69, 70. 1.

payments (e.g. hire of a slave) his property, and there were rules, which do not here concern us, under which he, or his representatives, would have to account to the person really entitled, for rents received in respect of a period after the usufruct had expired. But this has nothing to do with *fructuum perceptio*.

56. *Emphyteuta*. He acquired by mere *separatio*, by whomsoever effected. He had *possessio* of the *res*, and he acquired the fruits by virtue of his *ius in rem*, which in fact was very like ownership, since it was normally perpetual, subject to a rent and to a possibility of reversion on forfeiture. As it was not recognised, *inter privatos*, till late in the Empire, we have no discussion of the case in juristic texts.

Bona fide possessor. This is a person in possession, having no right to the thing, but believing that he has. The *bona fide possessor* acquires the fruits by their *separatio*, by whomsoever effected, and it is merely as a *bona fide possessor* that he acquires, without reference to other considerations. Thus it is not necessary that he be *in via usucapiendi*. He will be entitled to the fruits, even though the *res* is *furtiva*, or for any other cause incapable of usucapion, or even if he is holding without any *iusta causa* (*titulus*), which may often be the case. Conversely, the fact that he is *in via usucapiendi* will not, of itself, prove that he is entitled to the fruits. As we have seen¹, one who began to possess in good faith will acquire by *usucapio*, even though, while the time is still running, he learns that he is not entitled, and thus ceases to be a *bona fide possessor*. But from the moment when he ceased to hold in good faith he ceases to acquire further fruits, with the odd result that even though time ultimately runs in his favour, so that he acquires the land, he will still have to account for these fruits; and he cannot usucapt them, for his possession of them did not begin in good faith.

The foregoing is the classical law, but in the Byzantine age there was a great change. It still remained true that the *bona fide possessor* acquired all *fructus*, but, instead of acquiring them without any responsibility, he was now compelled to account for all that were unconsumed when the owner intervened to recover the property. If, however, they had, at that date, been consumed, no question arose: he had not to account for their value. This is expressed in the illogical looking maxim "*fructus consumptos suos facit*." The texts give no satisfactory answer to the question: what

¹ *Ante*, § 47.

amounts to *consumptio*? In particular, is sale consumption or must the price be accounted for? The better view seems to be that sale was consumption, and there was no liability to account for any fruits but those then actually existing *in specie* in the hands of the possessor. Though the new rule is stated in an enactment of Diocletian in Justinian's Code¹, and there is no obvious sign of interpolation, there is a much later enactment in the Theodosian Code which quite ignores it². It seems therefore that Diocletian's text must have been altered, and that the rule is of much later origin, perhaps not much before Justinian.

One further question arises. Why should a *bona fide possessor* acquire the fruits at all? He has, properly speaking, no right to the thing even if, as is not necessarily the case, he is *in via usucapiendi*. The justification suggested by the texts is that it is as the reward of labour: in the main the fruits are produced by him, and there is one text which suggests³, though this was certainly not the accepted law, that he acquired only those fruits which were in fact the result of his labour, not, for instance, such a crop as grass, *fructus naturales*, as opposed to crops which had to be cultivated, *fructus industriales*. In view of the fact that the acquisition was wider than this principle would justify, other explanations have been offered. It has been said that it is for the security of buyers from him, but for their security his *bona fides* would be immaterial. It has also been said that he is in fact a sort of equitable owner, and so acquires. But no text so speaks of him, and this would not explain his acquiring *dominium*. Another suggestion is that as the holder has been living as if this thing had been among his resources, it would be a hardship to make him account for the fruits. This seems hardly to take the real owner sufficiently into account. There are other suggestions, but it cannot be said that any of them is wholly satisfactory.

57. Appendix on *DONATIO*. *Donatio* is mentioned in the Institutes, though not by Gaius, as a mode of acquisition. The mention is at first sight remarkable, since *donatio* is not in the ordinary way a *modus adquirendi*, but only a *iustus titulus*. Where *A* gives *B* a thing, he does so ordinarily by *traditio*: the *donatio* is only the *causa traditionis*. Why Justinian treats it as a *modus adquirendi* we are not told, but two reasons may be suggested. One is that it

¹ C. 3. 32. 22.

² C. Th. 4. 18. 1; see D. 6. 1. 48.

³ D. 22. 1. 45.

is a convenient way in which to group together the special rules which were applicable to gratuitous transfers of property. The other is that there were one or two cases under his legislation in which the mere *donatio* did effect a transfer of ownership without further act of conveyance. But, in his discussion, this aspect is only lightly touched upon, and most of it is concerned with matters which seem to imply the first mentioned point of view.

Much complication is caused in the practical application of the rules by the fact that a gift is not necessarily a simple transfer of property. It may, for instance, take the form of the creation of a usufruct, or release from a debt to the donor, or to a third person, transfer of a right of action or undertaking of an obligation. We shall confine ourselves to the simplest case, actual gift of property. *Donationes* are of two kinds: *donatio mortis causa* and *donatio inter vivos*.

*Donatio mortis causa*¹. This is a gift made in contemplation of death, either general, or in view of imminent expectation or fear of it. As the matter is expressed in the texts, the donor wishes the thing to belong to the donee rather than to the *heres*, but to himself rather than to the donee. All such gifts were revoked *ipso facto* by insolvency of the donor, by predecease of the donee, and if the donor survived the peril in view of which the gift had been made. The texts tell us that they were revocable at pleasure, so long as the donor was alive, but it is held by some writers that this general right of revocation *ex poenitentia* has been introduced into the classical texts by Justinian, the doctrine having first appeared in post-classical times. *Donatio mortis causa* might be made in either of two ways. It might be under a suspensive condition, i.e., the ownership was not to pass though the thing was handed over, unless and until the expected death occurred, and this seems to have been the most usual form in classical law. It is a conditional *traditio*, operating, if the event occurs, as a *traditio brevi manu*. If the event does not occur, if, that is, the donee dies first or the peril is survived, etc., the ownership not having passed, the *res* can be vindicated, as also if the gift is revoked. It might however be under what is sometimes called a resolutive condition. The ownership passes at once, but if any of the events which revoke the gift occurs, the gift is to be of no effect. But in classical law there was no terminable ownership. There could be no reversion *ipso facto*, and the remedy would be

¹ In. 2. 7. 1.

a personal action, a *condictio*. At some post-classical time, however, a real action was given and it is clear that the reversion was *ipso facto* under Justinian.

There were no special rules of form in classical law, but Justinian established a form¹ practically the same as that he had laid down for codicils to wills, involving five witnesses, and he provided that where this form had been gone through the gift should operate like a legacy, i.e., the ownership would pass, if the event happened, without delivery or any other act of transfer. This is one of the cases in which *donatio* may justly appear as a *modus acquirendi*. The introduction of this form did not, so far as appears, prevent the making of such gifts, with the ordinary incidents, by actual delivery.

The provision of this form was part of a larger assimilation. The Institutes tell us that "*hae mortis causae donationes ad exemplum legatorum redactae sunt per omnia*." This is, however, an overstatement. In a great many points they were put on a level with legacies, but there still were great differences. They were not lost, as legacies were, by an unsuccessful attack on the will. They were not subject to the *regula Catoniana*². They did not depend on the existence of a will or on the entry of a *heres*. And a *filiusfamilias* could make such a gift with the consent of the *paterfamilias*. On the other hand, even in classical law, they had been made subject to the *leges caducariae* and the *lex Falcidia*³.

Donatio inter vivos. This is merely a gratuitous conveyance. Neither conveyance, nor the undertaking to give it had, in general, in classical law any special rules, but, late in the classical age, agreements for gifts between parent and child, where there was no *potestas*, were made binding, however informal, and Justinian made informal agreements to give (*pactum donationis*) binding generally⁴. Moreover, by a post-classical evolution, the delivery of a formal record of the gift (*instrumentum donationis*) was a valid transfer of the property, without *traditio*, so that here too *donatio* in a certain form is a *modus acquirendi*.

Donatio inter vivos was not in general revocable. But if the gift was made for application to a particular purpose (what came to be called a gift *sub modo*), and was not so applied, there was in classical law a *condictio*, and, from some post-classical time, an *actio in rem*, *vindicatio utilis*. In the third century and later there was legislation allowing revocation for ingratitude, established on enquiry, at first

¹ C. 8. 56. 4.

² *Post*, § 77.

³ *Post*, §§ 77, 79.

⁴ *In*. 2. 7. 2.

only in gifts to children and *liberti*, but, under Justinian, generally. The effect of the decree seems to have been *ipso facto* forfeiture of the gift.

An important rule affecting such gifts was that of the *lex Cincia*¹, of about 200 B.C. which forbade gifts above a fixed (unknown) amount except to certain relatives and other persons, aimed apparently not against prodigality, but against corruption of officials. It was a *lex imperfecta*, merely forbidding the gift, but not making it void. The effect was that the prohibition was good only as a defence. If the donee had in any way to come to court to claim the gift there was an *exceptio legis Cinciae*, where it was excessive. By a juristic rule of much later development the defence was available only to the donor, not to his successors—*Cincia morte removetur*. The accident of the survival of the Vatican Fragments has given us more detailed knowledge of the working of the rules than we have of most rules which, like this, were obsolete under Justinian. Owing to the many forms which a gift might take, the rules are complex, but a few simple illustrations may be given. If a *res mancipi* had been mancipated, by way of gift, to a person not in the excepted class, but not delivered, and he sued for it, his *vindicatio* could be met by the *exceptio legis Cinciae*. If it had been delivered but not mancipated, the old *dominus* could vindicate and if he was met by the *exceptio rei donatae et traditae*, he could reply by a *replicatio legis Cinciae*. But if both had been done the *lex* had no further application, even though the *res* happened to fall again into the hands of the donor. This however is subject to a modification in the case of a *res mobilis*. Under the interdict *utrubi* that claimant was entitled to recover possession, who had held the *res* for a greater part of the past year than his opponent had. If it was so recovered, the donor, afterwards sued for the gift, could use the *exceptio legis Cinciae*. The acquisition was not regarded as definitive till this recovery by the interdict was impossible.

The rule disappeared in later law, being replaced by a system of registration (*insinuatio*) for gifts exceeding a certain amount, 500 *solidi* under Justinian, to other than certain excepted persons. Apart from these cases the gift, if unregistered, was wholly void as to the excess, so that even if it had actually been transferred, the conveyance was void as to the excess, and ownership passed only *pro parte*.

¹ V. F. 260 sqq.

CHAPTER VIII

THINGS. RIGHTS *IN REM* LESS THAN OWNERSHIP. POWER OF ACQUISITION AND ALIENATION THROUGH OTHERS

58. The rights of enjoyment involved in ownership are innumerable. We have seen, however, that the *dominus* has not necessarily the practical exercise of these rights as matter of law. They may all be vested in a "bonitary owner," so that the actual right of the *dominus* has hardly any content at all. But there is a further possibility. Any one or more of the innumerable rights involved in the right of enjoyment may be vested in some person other than the owner. This does not mean merely that some person other than the owner may be allowed by him to get some advantage out of the property. That may be a mere matter of contract or permission, with no question of a *ius in rem*. The case with which we are concerned is that in which a person other than the owner has a right, more or less extensive, entitling him to some advantage from, or use of, the property, the right being enforceable not only against the owner but against anyone who interferes with it, and not necessarily originating by a grant from the actual present owner. Such rights, so far as they were institutions of the civil law, are conveniently called *iura in re aliena*. From another point of view they are called Servitudes, though it is likely that in classical law this name was applied only to that important class of them which are known in the texts as *iura praediorum*, praedial servitudes. It will be noticed that the two names express different aspects of the matter. The name *iura* expresses the position of the person entitled: he has a right in another's property. The name Servitude expresses the fact that it is a burden on the property, a more or less inconvenient restriction on his enjoyment, to which the owner must submit.

Servitudes are classed as Praedial or Personal. The essential difference, expressed in the name, is that praedial servitudes are regarded as attaching to the property itself rather than to the owner of it. Hence they are also and even primarily called *iura praediorum*. The property to which the servitude attaches is called the *praedium dominans*: that subject to it is *praedium serviens*.

Hence it follows that no one can have a praedial servitude, e.g., a right of way over the land of another, except as incident to the ownership of another *praedium* to which it attaches, and with the ownership of which it passes. Easements in gross, e.g., a right of way attaching to a man personally were not recognised: such a right could be no more than a *ius in personam*. Personal servitudes, on the other hand, such as usufruct (life interest) attached to a man personally and did not depend on his having other property to which they were in some way appurtenant. But besides this difference there were others almost more striking. Praedial servitudes arose only in connexion with land: personal servitudes applied equally to moveables. Praedial servitudes were, in principle, perpetual, while personal servitudes were always of limited duration, the normal form being a life interest. Praedial servitudes were, in general, definite, limited rights, which did not interfere with or prevent the actual possession and enjoyment of the servient tenement by its owner. The existence of, e.g., a right of way over my land, would no doubt be to some extent an inconvenience to me, but it did not prevent me from exploiting my land. A personal servitude, however, so long as it existed, excluded the owner of the land affected from enjoyment, so far as it extended, and, in the most usual of them, usufruct, this amounted practically to complete exclusion for the time being, except indeed that, usufruct being a *res incorporalis*, the legal *possessio* was still technically in the owner. But the usufructuary has *possessio iuris* (*quasi-possessio* in later law) and the owner has in fact no practical right of use of the land, and no actual possession. These differences are so profound that it is a little surprising to see such very different rights brought under the common name of Servitudes. In fact this does not seem to have been the case in classical law. Both groups were *iura (in re aliena)*, but only the *iura praediorum* were called servitudes. The assimilation, which occurred at some post-classical or late-classical time¹, is the natural result of the fact that many of the general principles are the same and the remedies, and modes of creation, *mutatis mutandis*, also the same.

The main principles common to all these rights are the following:

A man cannot have a servitude over his own property: *nulli res sua servit*. If the holder of a right of way acquires the servient land,

¹ See D. 8. 1. 1.

the servitude is merged in the ownership, and ceases to exist. If I grant a man a usufruct over land belonging to me, reserving a right of way to other land of mine, this is not a servitude, for I am the owner of the land subject to it: it is not a *ius in re aliena*. The correct analysis of the matter is that usufruct may be more or less extensive and that, in this case, the advantages usually involved in usufruct are reduced by this small advantage reserved to myself.

There cannot be a servitude on a servitude: *servitus servitutis esse non potest*. This rule also is illustrated by the last case put above. A servitude is essentially a burden on ownership, not on any lesser right. It is on this principle that we are told that there could not be such a thing as a usufruct in a right of way or water.

A servitude cannot consist in an obligation to do something: *servitus in faciendo consistere nequit*. All rights *in rem* are necessarily rights to abstentions, not to positive acts. The right of the person entitled to the servitude will be either a *ius faciendi*, a right to do something on the servient land, e.g., a right of way, or a *ius prohibendi*, the right to prevent the doing of something on it, e.g., a *ius non altius tollendi*.

A servitude is a *res incorporalis*, and is thus incapable of being possessed. But in fact there was much the same protection. There were interdicts for interference very like the possessory interdicts; and there was said to be *possessio iuris*, in later law, *quasi-possessio*, of such things.

59. PRAEDIAL SERVITUDES¹. Rights of this kind are of extreme antiquity: rights of way and water are a necessity to the most primitive agriculture. Accordingly we find them regulated by the XII Tables. But the servitudes of that time were only the simplest—rights of way (*iter, actus, via*) and water. *Iter* is later defined as right of footway, *actus* as right to drive cattle and wheeled vehicles, *via*, a prepared roadway. The XII Tables define the width of a *via*. As civilisation developed, the number of these praedial servitudes was greatly increased, till they were *paene innumerabiles*. The growth of urban life accounts for a number of them, e.g., *lumen, ne luminibus officiatur, tigni immittendi, oneris ferendi, altius non tollendi*, etc., and there appeared also a number of rights differing from the primitive rights of way and water in that they involved not merely access to the land, but the taking of

¹ G. 2. 14; In. 2. 3.

something from it. Such were, e.g., *ius aquaehaustus*, right to draw water, *ius pecoris pascendi*, right of pasture, *ius calcis coquendae*, right to burn lime, *ius harenæ fodiendae*, right to dig gravel, and others.

Praedial servitudes were perpetual and were therefore possible only over what was itself perpetual. Thus there could be no servitude to draw water from a tap or a pond which was not fed from a stream, and, at one time, though this was relaxed, there could be no such servitude, except from the actual source. From the necessity of perpetuity it follows that if it was created to end on a given date or on the occurrence of a certain event, this limit was in strictness void, though the Praetor would give effect to it¹.

Such servitudes could not be created to begin in the future or on a certain event. This appears to be due to the fact that originally the only modes of creation *inter vivos* were by formal processes which themselves did not admit of *dies* or *condicio*. It does not seem clear that the rule applied to the informal methods of later law or to legacy.

All such servitudes must be so enjoyed as to interfere with the exploitation of the servient land as little as is consistent with getting the full advantage of the servitude. Thus there could be no servitude which merely inconvenienced the servient owner with no real benefit to the dominant tenement. And, as it is advantage to the tenement, rather than to its owner personally, that is in question, it follows that there can be no servitude of merely walking or picnicking on the land, since this would be just as advantageous to any other person as to the owner of the dominant tenement, as such. For the same reason the *praedia* must be near together, though they need not actually adjoin: unless they are near together there cannot be said to be any advantage to the *praedium*, as such. The same principle leads to the further rule that the use must be solely in connexion with that tenement. Thus one who has a right of *aquaehaustus* may not sell the water.

All praedial servitudes were indivisible. This means, *inter alia*, that such a servitude attached, as a whole, to the whole *praedium*. Thus it could not be lost *pro parte*, or acquired *pro parte*. And if it extended over two *praedia* it could not be lost over one if it was not over the other².

¹ D. 8. 1. 4.

² D. 8. 3. 18.

Praedial servitudes are classed under two heads: Rustic and Urban. The names are indeed most commonly applied to the *praedia*: the texts speak of *iura praediorum rusticorum*, *iura praediorum urbanorum*, and this way of putting the matter throws some light on the difficult question of the exact distinction between them. The names indicate that it is a characteristic of the dominant *praedium*, that which has the *ius*, which decides the matter. The view most widely held is that an urban servitude is of a type which is most usually enjoyed in connexion with a building, all others being rustic. Thus we are told that *lumen* and other rights to light, *tigni immittendi*, *oneris ferendi*, etc., are urban, while rights of way and water, pasture, lime burning, digging gravel, etc., are rustic. But there are some texts which at least seem inconsistent with this view and have suggested the opinion that there was no definite list of each class, but that a servitude was urban or rural according as it was or was not enjoyed in connexion with a building. But this view seems to create more difficulties than it solves.

We are told that rustic servitudes could be pledged. As they were *res Mancipi*, this probably meant originally that they could be alienated as security, by *mancipatio cum fiducia*, with the *praedium* to which they were attached. But in classical law, it seems to have meant more. They could be pledged independently to a creditor who had a neighbouring estate, to enjoy them till the debt was paid. Moreover he could obtain payment, by selling the servitude to any other neighbouring owner¹. This is anomalous both in its alienability from the *praedium* to which it was attached, and in its terminable character.

Praedial Servitudes are also classed as positive (*quae in faciendo consistunt*) and negative (*quae in prohibendo consistunt*). The former class involve actual interference with the servient land, e.g., a right of way. The latter do not, e.g., a right to light. This distinction coincides closely with that just stated. All known rustic servitudes are positive, and nearly all urban servitudes are negative. Indeed though there are one or two which seem equivocal, e.g. *tigni immittendi*, the right to have your beam in your neighbour's wall, it seems that in practice they were all treated as negative, a point of importance in dealing with acquisition and loss.

There are several servitudes which seem anomalous.

¹ D. 20. 1. 12.

Oneris ferendi. This was the right to have one's wall supported by a wall of the servient tenement. Its peculiarity was that there was a duty to keep the servient wall in repair. This is anomalous, since it is an active duty. Moreover it is not a *ius in rem*, for it obviously does not bind everybody; and yet the duty passes with the ownership of the servient land, as a mere contractual liability would not. It is perhaps best explained as a survival from an age before these distinctions were clearly recognised.

Stillicidii non recipiendi, *altius tollendi*, *luminibus officiendi*, are all remarkable as they are the opposites of well known servitudes, i.e., *ius stillicidii*, the right to have your raindrip fall on your neighbour's land, *altius non tollendi*, the right to prevent your neighbour from building higher, *ne luminibus officiatur*, the right that your light shall not be obstructed. The nature of these opposite servitudes is nowhere explained in the sources, and various rationalisations have been offered. On one view, they were releases from an obligation imposed by local or general legislation requiring owners of houses to submit to raindrip, not to build above a certain height, not to obstruct existing lights. But it is difficult to suppose a neighbour could release from a restriction imposed in the general interest. On another view, they were a mode of releasing an existing servitude, but they seem unnecessary for this, since these could be released directly. A more probable explanation is that they were modes of partial release from an existing servitude, which could not be effected directly, since, as praedial servitudes were indivisible, they could not be released *pro parte*.

60. CREATION OF PRAEDIAL SERVITUDES. Rustic servitudes were *res Mancipi*, and thus could be created by *mancipatio*, a process not applicable to urban servitudes, except in the sense that if a *praedium* was alienated by *mancipatio*, any existing servitude passed with it. It is possible that the Sabinians held that only the four original rustic servitudes, *iter*, *actus*, *via* and *aquaeductus* were *res Mancipi*. Apart from this point, the modes of creation were the same for rustic and urban. *Cessio in iure*, the most formal mode, was obsolete under Justinian. They could be created by will, or as part of an *adiudicatio* of lands. When land was alienated by *mancipatio* or *cessio in iure* it was possible to reserve a right of servitude for the transferor by a declaration in the ceremonial of

conveyance: and the same thing could be done under Justinian, in a conveyance by *traditio*. They were, it seems, susceptible of *usucapio*, till a *l. Scribonia*¹, probably of the end of the Republic, forbade this. But, late in the classical age, the notion of *longi temporis praescriptio* was applied to the quasi-possession of them, the periods being as in the case of ownership. It does not however appear that there was any requirement of *bona fides* or *iusta causa*.

There is obscurity in the texts as to two other modes of acquisition.

Quasi-traditio, Patientia. It is clear that under Justinian servitudes could be created quite informally, by assent of the owner of the servient tenement, followed by actual entry on enjoyment. The notion is hardly applicable to any but positive servitudes, and it is quite uncertain how far, if at all, it was recognised in the classical law. Most of the texts which deal with the matter are interpolated, but it seems probable, though hardly proved, that on such facts the Praetor gave an *actio in factum*, giving protection to the right as a *ius in rem*.

Pact and Stipulation. This is a formless pact to grant the servitude, reinforced by a *stipulatio*, originally no doubt a stipulation for a penalty if the servitude were not allowed in accordance with the pact, which was itself not an actionable form of agreement. It seems often to have been combined with *quasi traditio* in positive servitudes, but in Justinian's law and in the immediately preceding age it was fully recognised as creative of both positive and negative servitudes. It does not seem to have been recognised at all in Roman practice in the time of Gaius, though it was used among provincials and for provincial land². When it was first recognised in Roman Law cannot be said, but there seems no evidence for it in classical times. It will be noticed that it gives a *stipulatio* an effect *in rem*, though *stipulatio* is merely a contract, creating normally only *iura in personam*, binding, that is, only between the actual parties. The whole question is rendered obscure by the interpolated state of the texts.

Termination of servitudes. Though praedial servitudes were normally perpetual, there were many ways in which they might determine. We have seen that, if originally given for a limited period, the Praetor, though not the civil law, would give effect to

¹ D. 41. 3. 4. 28.

² G. 2. 31.

the limit, and the same may be said of a pact not to exercise it, or any form of renunciation. All these would be complete destruction of the right under Justinian. Formal renunciation by *cessio in iure* ended it in classical law but was obsolete under Justinian.

Servitudes would end by *confusio*, i.e., by the coming of the two tenements into the same hand. As they were indivisible, acquisition of part of the dominant by the owner of the servient tenement would not affect them, and acquisition of part of the servient by the owner of the dominant tenement would affect the servitude only if it was defined and fell wholly within the part acquired. The acquisition of an undivided share in the other tenement had no effect on the servitude.

They would be lost by non-use, in classical law for two years: under Justinian for the ordinary terms of *longi temporis praescriptio*. But there is an important distinction to be drawn. Rustic (i.e. positive) servitudes were lost by mere non-use, by simply neglecting to take advantage of them. But there is no such thing as non-use of a negative servitude unless something is done on the servient tenement which is inconsistent with the servitude. A right to light is not lost by not looking out of the window, or even by not having a window on that side to look out of, but it will be lost if an obstruction is raised on the servient land, and remains for the necessary time. And this is not exactly non-use: it is regarded as *usucapio libertatis*, and is thus subject to the principles of *usucapio*, except indeed that neither *bona fides* nor *iusta causa* is requisite. One important result of this was that it depended on possession by the servient owner who was in course of release. Thus, if he ceased to possess the servient land, time ceased to run in his favour¹.

They would be lost by destruction of either *praedium*, or even by such an alteration in the servient tenement that there could be no servitude on it, or this particular servitude became impossible. Thus the right to draw water was lost if the water dried up: there was no liability on the servient owner. But here if the original state of things was restored before the time necessary for loss by non-use had expired, the right revived. And there could be no servitude over *res divini iuris*, so that if the property became *solum*

¹ D. 8. 2. 32. 1.

sacrum or *religiosum*, the servitude was destroyed. Apart from this, the servitude was independent of the ownership: a right of way was not lost because the servient land ceased to have an owner¹.

Remedies for praedial servitudes. A servitude being a *ius in rem*, the remedies, for its protection, were analogous to those for ownership. If a man was in peaceful enjoyment of a servitude, whether entitled or not, and his enjoyment was interrupted by someone who disputed his right, he had an interdict, analogous to the possessory interdicts available to one whose possession of property was interfered with, under which the interruption would be stayed, and the intervener left to dispute the servitude by legal process. Apart from these provisional remedies, the "real action" for the recovery of a servitude was called, at least in later, and possibly in classical law, the *actio confessoria*. There was also an action to be brought by one who denied the existence of a servitude on his land—the *actio negatoria*. This at first sight looks strange, for we do not hear of any similar action in respect of property, any action denying ownership. The explanation is that the *actio negatoria* is really a *vindicatio* of the ownership as being free from such servitude. A simple *vindicatio* would be of no service against one who was exercising a servitude, for he did not dispute the ownership. Accordingly what the action claims is that, the land being the plaintiff's, there is no such servitude as that alleged by the defendant. There are also traces of an *actio prohibitoria*², the purpose of which is not certainly known, but which may be connected with praetorian servitudes, such as those created by *quasi traditio* in classical times. And there seem to have been some cases in which the Praetor protected servitudes lacking in one or other of the characteristics which the civil law requires, by giving *actiones utiles*.

61. PERSONAL SERVITUDES. We have already noted that the description of these rights as servitudes is in all probability post-classical. The rights themselves, or at least usufruct, the most important of them, existed in the Republic. But the idea it embodies is not primitive. Probably the earliest usufructs were provisions for widows, married without *manus*, and not having a *dos*, the property or part of it being left to them for their life, to revert to the *heres* at their death. As the right of enjoyment is,

¹ *Arg. U. 1. 19; Fr. D. 10.*

² *D. 7. 6. 5. pr.; 8. 5. 11.*

for the time, vested in the usufructuary and not in the owner, they are much more like limited ownership than like servitudes, but since a terminable ownership was not recognised, the fact that they were of limited duration caused them to be considered as rights different from, and less than, ownership—*iura, in re aliena*. While, as we have seen, praedial servitudes were very numerous, the number increasing as the needs of a more complex civilisation increased, the personal servitudes were only four, *ususfructus*, *usus*, *habitatio* and *operae servorum vel animalium*. And of these the last three are merely fractions of usufruct, gradually recognised as distinct servitudes.

Usufruct¹. This is defined as the right of using and enjoying the property of another *salva rerum substantia*. This obscure expression may mean either "provided the character of the thing remains unchanged" or "with no right to change the character of the thing": on either interpretation it expresses, as we shall see, a characteristic rule of the institution. It was usually for life, and though it might be for a fixed term, it ended in any case at the death of the holder. If it was given to a corporate body it ended, at least in later law, in 100 years. The usufructuary was entitled to the *fructus*, the ordinary products of the thing, crops, young of animals, subject to the obligation of *summissio*, already mentioned, but not the children of *ancillae*, who, out of respect for human dignity, were not regarded as fruits. The rights did not cover mere accidental increments, such as *insulae natae*, in which there was not even a usufruct. Trees were not *fructus*, except in a timber estate in which the ordinary profit was in cutting timber, and here the cutting must be done in a husbandlike way. Analogous rules apply to the getting of minerals. The usufructuary had all ordinary rights of use and enjoyment, use of tools, accessories and the like. He might let the land or hire out slaves or cattle, the proceeds of such transactions going to him; they were not *fructus*, but have acquired the name *fructus civiles*. The extent to which he acquired through the activities of a slave in whom he had a usufruct will be considered later².

He might improve the property, so long as he did not alter its character; but he had no right to remove any fixed improvements he had made: *quod plantatur solo, solo cedit*. He must maintain the

¹ G. 2. 30 sqq.; In. 2. 4.

² Post, § 63.

property, cultivate properly, pay all ordinary outgoings and, in general, act like a *bonus paterfamilias*. He could not alienate the usufruct, and some jurists held that an attempt to make *cessio in iure* of it to another caused forfeiture, but the view which prevailed seems to have been that such an act was a nullity. But he could sell or let the enjoyment of it, taking the price or rent as his profit. This, however, did not create any relation between his vendee or tenant and the *dominus*: the usufructuary remained usufructuary and thus responsible to the *dominus*.

The obligations of the usufructuary doubtless existed at civil law, but we do not know how they were guaranteed. The Edict dealt with the matter, in legacies of usufruct (and the practice was extended to all cases), providing that the usufructuary must give security for the fulfilment of his obligations and for the return of the property on the expiration of the usufruct.

Unlike praedial servitudes, usufruct was divisible. Thus two persons might hold shares in a usufruct, either under one or under separate gifts. In the former case, if one share lapsed it accrued to the other: in the latter, the lapsed share fell to the *dominus*.

As the thing had to be restored at the expiration of the usufruct, there could be no usufruct of perishables. Difficulty was created by the fact that the common case of a usufruct of all or an aliquot part of a man's property would usually in terms cover some perishables. Early in the Empire it was provided by senatusconsult that where a legacy of usufruct covered perishables the ownership should pass to the legatee, who had to give security to return the value at the expiry of the usufruct. It was in effect a loan for life without interest. This institution is conveniently called quasi-usufruct. It has no application except under wills, or codicils.

Creation of Usufruct. Legacy was by far the most usual case, but most of the methods available for praedial servitudes were applicable here, e.g., *cessio in iure*, in classical law, *quasi-traditio*, at least in later law, and *adiudicatio* in a divisory action. There might be *deductio* of a usufruct in an alienation of property. *Longi temporis praescriptio* was applicable in later law, probably, though this is not certain, subject to *bona fides* and *iusta causa*. There were certain cases in which usufruct arose by operation of law and not by express grant. Well known instances are the usufruct of the *paterfamilias* in *bona adventitia* of a *filius* in later law, and of a half

of them, on emancipation, under Justinian, which we shall shortly discuss¹. But there were other cases. It should be added that, if by legacy, it might be *ex die* or *sub condicione*.

Expiration of usufruct. It might end in many ways. It might be surrendered to the *dominus* by *cessio in iure* in classical law. An informal renunciation was not at that time effective in civil law, but it would be enforced by the Praetor under an *exceptio pacti*. In Justinian's time any form of renunciation ended it. It would end by the death of the holder or the arrival of a time limit, or if the interests of usufructuary and *dominus* came into the same hand, here usually called *consolidatio*. It was ended if the title of the *dominus* who created it was from any cause destroyed *ab initio*, as might happen, for instance, where a *heres* created a usufruct in a piece of property which had been left to another person under a condition not yet satisfied. But the mere fact that the ownership was transferred would not affect usufruct. Usufruct was ended if the character of the property was fundamentally changed, e.g., if a house were built on a plot of pasture land. It was ended by non-use for the period of *usucapio*. But non-use was construed rather in favour of the usufructuary. Thus, if a third person, even unauthorised by the usufructuary, was making any use of it in his name, this prevented time from running². And if the fructuary sold the enjoyment and received the price, it became impossible for the right to be lost by non-use. It was also lost by *capitis deminutio* of any kind in classical law, by *maxima* or *media* under Justinian. This loss by *capitis deminutio minima* was found to be an awkward incident, in such cases as adrogation, and was guarded against by giving successive usufructs for a year each, the effect of which was that an *adrogatio* would end the usufruct for that year, but a new one would begin at its end, or by giving a usufruct till *capitis deminutio*, and another thereafter, and so on, by which method there would be no interval at all.

Where a usufruct was acquired by will, by a *paterfamilias*, through a legacy *per vindicationem* to his son or his slave, it failed of course on the death or *capitis deminutio* of the *paterfamilias*. But in classical law it failed also on the death or *capitis deminutio* of the son, and the death, manumission or sale of the slave³. This rule did not apply to gifts of usufruct *inter vivos*, or to legacy in

¹ *Post*, § 63.

² D. 7. 1. 12. 2.

³ V. F. 57.

other forms, because these only imposed a duty on the *heres* to create the usufruct, which would therefore be in fact created *inter vivos*. It was gone under Justinian, but he provided that where a usufruct was acquired through a son who outlived the *paterfamilias*, the son would have the usufruct¹.

Remedies for usufruct. Provisional protection against *de facto* interruption of actual enjoyment was not by special interdicts as in the case of praedial servitudes, but by the same interdicts as were used in the case of ownership, modified in terms to suit the case—*uti possidetis* and *utrubi*. The action claiming a usufruct was a *vindicatio usufructus* (*actio confessoria* in later law), and there was also an *actio negatoria* as in praedial servitudes, by which an owner of property claimed that the defendant had no usufruct in it. As in praedial servitudes, there were *actiones utiles* for those usufructs which had been created by methods which had only praetorian sanction.

62. *Usus*. This appears to have been recognised as a distinct *ius in re aliena* about the beginning of the Empire. It is essentially a fraction of usufruct, *usus* without *fructus*. In strictness, there was no right to any fruits but this was somewhat relaxed in practice. The usuary of a house might consume the fruits of the gardens in his household, but he might not sell them, as a usufructuary might. He might not sell the enjoyment, or let the house, as this was analogous to taking fruits. On the other hand, he might have guests, or even lodgers at a rent, if he still remained in occupation. Unlike *ususfructus*, *usus* was indivisible, so that it could not be held in undivided shares, but though this is clearly stated cases are mentioned in which joint interests might arise. These need not be detailed. In effect the rule seems only to prohibit the express creation, at the same time, of *usus* in one and *fructus*, without *usus*, in another.

Apart from what has been said, the rules were as in usufruct, i.e. as to modes of acquisition and loss, and as to remedies.

*Habitatio*². This is a specialised form of *usus* of a house or lodging. Although legacies of *habitatio*, especially to dependents, date from the Republic, it is probable that at first they were not regarded as creating any *ius in rem*. But in the Empire *habitatio* was recognised as a form of *usus* but it was gradually differentiated

¹ C. 3. 33. 17.

² In. 2. 5. 5; D. 7. 8. 10.

in minor points. We know, however, little of its special rules till the time of Justinian. It could be given only by will or codicil. It was normally for life and it was not lost by non-use, or by *capitis deminutio*. The accommodation might be let, but the right could not be sold or given away.

*Operae servorum vel animalium*¹. This again is a specialised form of *usus* which gradually developed differences, based, as were those in the last case, on presumed intent. It could be created only by will or codicil. It was not lost by death or *capitis deminutio* of the legatee, but it was ended by death or *usucapio* of the slave or animal. Sale was of course subject to the right, and, presumably, there could be no manumission (apart from concurrence of the usuary) till Justinian, under whose rules the usuary would still be entitled to be served. It was not lost by non-use, the reason apparently being that a "daywork," an *opera*, was thought of as a unit of value, and this was regarded as a legacy of a succession of *operae*, so that the destruction of the right to one would have no effect on the later ones.

These are all the rights which were called Servitudes at any time in Roman Law. All of them were civil law notions, though, as has been said, the group last considered were probably not called servitudes in classical law and both in this case and in that of praedial servitudes the Praetor extended protection beyond civil law limits. There were two other rights affecting land, which may be called *iura in re aliena*, namely *emphyteusis* and *superficies*. They were not thought of as servitudes, for which the reason may be given that *emphyteusis*, as an institution of private law, was not known till Byzantine times, and *superficies*, though known in classical times, was then purely praetorian. But they differ from servitudes in another way. All servitudes, as we have seen, either gave definite rights not involving possession of the subject matter of the servitude, or were limited in duration. These other rights gave actual possession of the property (they applied only to land) and were, or might be, perpetual.

*Emphyteusis*². In the early Empire, lands of the State or of *civitates* were granted in perpetuity or for long terms at a fixed rent. Though originally mere contracts, these arrangements acquired in classical law the character of a praetorian *ius in rem*.

¹ D. 7. 7; 7. 9. 5. 3; 33. 2. 2.

² C. 4. 66. 1.

There was a real action (an *actio fictitia*), there was interdictal protection, and the holding became alienable by *traditio*. In the fourth century the Emperors dealt similarly with their lands. These institutions acquired the generic name of *emphyteusis*, which expresses the fact that there is substantially one ownership grafted on another. In the fifth century the method was adopted by private owners. Zeno laid it down that the transaction was not to be considered as a case of hire (*locatio conductio*) or of sale, but was to be a contract *sui generis*. *Emphyteusis* might be created by will or by any form of agreement followed by entry. It might be transferred by will or alienated *inter vivos*, but, on sale, the *dominus* had a right of praemption, and a claim to a fine of 2 per cent. of the price if he did not exercise this right. It might end by surrender, lapse of the term, destruction of the property, death of the holder without successors, and by forfeiture for irretrievable damage, or for non-payment of rent or taxes for a certain time.

*Superficies*¹. This, which was originally a building lease, by the State or a *civitas*, was in use among private persons in the classical law. It gave an interdict and the Edict appears to have provided that such actions would be given as might be necessary to protect the *ius in rem*: these would be the ordinary actions of ownership in a *utilis* form. The view has, however, recently been maintained that all the various effects *in rem* belong to the Byzantine age.

Another right sometimes mentioned as one of these *iura in re aliena*, other than servitudes, is *pignus*, the right of the creditor, the pledgee, to hold against third parties a thing which has been given to him as security for his debt. But in fact this is not in accord with Roman notions. The pledgee's right was merely to hold the thing if attacked, to recover it if he lost possession, and in certain circumstances to alienate it. It had no substantial content, i.e. it conferred no right of enjoyment whatever. The institution will be considered under the head of real security.

63. POWER OF ALIENATION AND OF ACQUISITION THROUGH OTHERS².

There were several cases in which an owner had no power of alienation. *Pupilli* could alienate nothing, and adult women *in tutela* (so long as this institution lasted) no *res mancipi*, without the tutor's *auctoritas*. Lunatics and *prodigi interdicti*, under *cura*,

¹ D. 43. 18.

² G. 2. 62-64, 80-96; In. 2. 1. 42, 43; 2. 8; 2. 9.

could not alienate. Husbands could not alienate dotal land. It was impossible in classical law so to alienate property that it should be inalienable by the acquirer. Justinian's possible modification of this has already been mentioned¹. There were also rules, prohibiting in certain conditions, the alienation of property the subject of litigation—*res litigiosae*.

Though agency in the modern sense, a principle under which the acts of an authorised representative directly bind and benefit the principal, was little developed in Roman Law, there are some expressions of it in the law of alienation of property. The chief cases of alienation by a non-owner are these: Guardians had powers of alienation differing in the different cases, in general only by *iure gentium* methods, but *curator prodigi* could alienate by *mancipatio*. These rules cannot be regarded as representation, as the power in no way depended on authorisation by the owner.

Filiifamilias and slaves could alienate if duly authorised, but not by *cessio in iure* since they could take no part in a *legis actio*, of which this was in form an instance; nor could slaves by *adiudicatio*, since they could take part in no litigation. Whether slaves and *filiifamilias* could alienate by *mancipatio* is disputed.

A pledge creditor could alienate in certain conditions to be considered later².

A *procurator*, duly authorised, could alienate by *traditio*. This is a natural consequence of the power, recognised early in the Empire, to transfer *possessio*, but it is sometimes held that his power of transferring *possessio*, and with it ownership, is of much earlier development. In any case it is clear for classical law. In later law such an alienation could be effected by any free person duly authorised.

It remains to consider, and here rather more detail is needed, the cases in which one man could acquire property through the act of another. There are several cases.

Free persons not in the *familia*, or possessed. In later classical law, a *procurator*, a general manager of one's affairs, could acquire for one by *traditio*. Even before the end of the classical age this seems not to have been confined to a *procurator* having charge of all one's affairs, and in later law any free person could so acquire for us, if he was duly authorised or his act was ratified.

¹ *Ante*, § 42.

² *Post*, § 143.

Guardians. These could certainly acquire for their wards by *traditio* in later law and it is probable that they could do so from the earliest times.

Slaves held by their *domini*, persons *in manu* and those *in mancipio*. Everything they acquired went to the *dominus* or *paterfamilias*. This is not a case of representation but an expression of the fact that all the rights of the *familia* were centred in the *paterfamilias*. None of these could acquire by *cessio in iure*, as they were incapable of *legis actio*, and a slave could not by *adiudicatio*, for reasons already given. A slave acquired for his bonitary, not his quiritary owner, and a slave having two masters acquired for them in common unless he took expressly in the name of one of them, or, in later classical law, by his express direction. In these cases the owner concerned alone acquired. Any injustice arising from the working of the ordinary rule could be put right in the *actio communi dividundo*.

Slaves held in usufruct, persons *bona fide* possessed as slaves being under similar rules. Here the claims of these holders and of the *dominus* compete, and the rule arrived at was that usufructuary and *bona fide possessor* acquired only *ex re* and *ex operis*. The former term means, in transactions connected with their affairs. The latter, *ex operis*, is narrow and in practice means only hire, where the slave has hired out his own services to a third party. Everything else went to the *dominus*. It was not always easy to say what was *ex re fructuarii*. In particular, since inheritances by will and legacies to the slave went normally to the *dominus*, as not being *ex re ususfructuarii* or *ex operis*, there was a difficulty where the testator had made it clear that he meant the holder to benefit. But the decision reached was that, even so, it went to the *dominus*. On the other hand there are indications of a different rule for *donationes*. In general they went to the *dominus*, but some texts give them to the usufructuary or *bona fide possessor* where intent to benefit him was clear. The complications which arose in this case too from *iussum* by one party or *nominatio* of one party in the transaction we shall not consider.

Filiusfamilias. In the Republic everything went to the *paterfamilias*: the rules were much the same as in the case of a slave. The *filius* could not acquire by *cessio in iure*. His *peculium* did not belong to him any more than that of a slave did to the slave. But

at the beginning of the Empire a change began which, in the long run, completely revolutionised the economic and legal position of the *filiusfamilias*. The first step was the introduction, under Augustus, of *peculium castrense*. This consisted of what was given to the *filius* for the purpose of military service or acquired by such service. Of this fund he had complete power of alienation: the *pater* had during the life of the *filius* no control whatever. The *filius* could make a will of it, though, till Hadrian's time, only while still on service. If he did not, and died still in the *familia*, the fund reverted to the *paterfamilias*, like ordinary *peculium*, not as an inheritance. But under Justinian if he made no will, his issue, and, failing them, brothers and sisters, took it as inheritance. If there were none the father took it, whether as inheritance or as *peculium* is uncertain. We shall see later that the difference was material¹. If the son passed out of the family, by emancipation or adoption, he took it with him. While still in the *familia* he was regarded, as far as this fund was concerned, as a *paterfamilias*, so that he could bring and defend all actions arising in connexion with it. Conversely, though a father was liable on a son's contracts, so far as his *peculium* would go, he could not be sued at all on contracts arising out of transactions of this fund. The ordinary *peculium*, as opposed to this privileged fund, is sometimes called *peculium profectitium*, though the name does not seem to be Roman.

Constantine carried the matter further by introducing *peculium quasi castrense*. This covered receipts from certain public services and was from time to time extended till it covered most important services and professions. It was dealt with like *peculium castrense* except that, till Justinian, there was in general no power of disposing of it by will, though there were some exceptions. Indeed as this *peculium* was governed by many different enactments it is possible that there were differences of detail on other points.

Bona materna, later extended and called *bona adventitia*, mark a further step. Constantine provided² that what a child inherited from his mother should belong to him and not merge in his father's property, though the father had what was practically a usufruct in it. This was extended to other successions, and acquisitions, and, under Justinian, it covered practically all acquisitions of the *filius* (other than those funds just mentioned)

¹ *Post*, § 88.

² C. Th. 8. 18. 1; C. 6. 60.

which were not from the father's estate. The father enjoyed it, but could not alienate it. The child had no special powers in connexion with it. If he died in the *familia*, the father took it, at first as *peculium*, later as *hereditas*, Justinian, as in the above cases, giving children and brothers and sisters a right in preference to the father. If the child was emancipated or given in adoption he took two-thirds, the father keeping the rest absolutely. Under Justinian, *adoptio* normally did not affect it (as it usually left the *potestas* unaffected¹), and he modified the rule in *emancipatio*. The whole was to go ultimately to the child, but the father had a usufruct of half for his life.

It will be seen that these various funds, especially the first two, fundamentally altered the position of the *filius*. In Justinian's time there must have been a great many *filiifamilias* who were practically independent of the *paterfamilias*. But it must not be forgotten that while daughters had the benefit of the system of *bona adventitia*, they could have no *peculium castrense* or *quasi castrense*.

¹ *Ante*, § 28.

CHAPTER IX

THINGS. UNIVERSAL SUCCESSION. WILLS

64. The topic we have been considering is that of the acquisition of *res singulae*: we now pass to what Gaius calls acquisition *per universitatem*, and something must be said of the meaning of this expression.

In the time of Justinian the *universitas rerum*, or *universitas iuris* (both expressions are used) is a somewhat abstract conception: it means the sum or whole of a man's legal position so far as it concerns the *ius rerum*. The conception is important in law only on the occasions, of which death is by far the most important, on which the *universitas* passes from one to another. It is to be observed, however, that, in practice, what is transferred is not quite the same as what was held: some of the elements of the *universitas* are extinguished by the event leading to the transfer. A life interest does not pass to the *heres*. The expression *universitas rerum* is also used in another sense, to denote any collection of objects considered as a whole. Thus a flock of sheep is a *universitas rerum* or *facti*, and may be "vindicated" as such. This is not very important in law, but it has its significance in the history of the conception of a *universitas*. It is by no means clear that the acquisition *per universitatem* of Gaius is quite the same as Justinian's acquisition of a *universitas iuris*. It is not probable that Gaius thought of the liabilities as part of the *universitas* which was acquired. They passed indeed in the case of *hereditas*, though not in some of the other cases, but *res* are "assets," and liabilities are not "assets," and Gaius seems to have thought of them rather as a burden passing with the *hereditas* than as part of it. It included, however, more than the physical things, for he treats a *hereditas* as a *res incorporalis* and no mass of physical things could be this. But even this need mean no more than that the notion of *universitas* included the incorporeal rights *in rem*—usufructs, etc.: it does not follow that it covered rights *in personam*, debts due to the estate. And when we remember the hesitation of Gaius, already noted, on the question whether *obligationes* were *res* or not, it becomes

possible to doubt whether he really included *iura in personam* in the conception of the *hereditas*. He may well have regarded them as passing with the *universitas* to the *heres*, by virtue of a provision in the XII Tables, rather than as forming part of it. On this point we can draw no certain conclusion from the rules of the numerous cases of such transfer otherwise than on death, since nearly all of them are created by express enactment of some sort, and the rules depend on the detailed provisions of these enactments, which we commonly know only in outline. But two of them, *adrogatio* and passing into *manus*, belong to the ancient customary law, and in both of these the language of Gaius suggests that the rights *in personam* were regarded as passing, as a logical result of the transfer of the *universitas*.

Succession on death may occur under a will or without one, *ab intestato*. Of these cases, succession by will is much the most important, partly because of the rather complicated rules, and partly because in practice it seems to have been unusual for a *paterfamilias*, capable of testation, not to make a will: intestacy was looked on as a great misfortune.

The will (*testamentum*) of the historical Roman Law was primarily a document or declaration, in a prescribed form, by which a testator nominated a successor or successors (*heres, heredes*) on whom his property rights and liabilities devolved, in the mass, so far as they were not extinguished by the death, and who thus, so to speak, represented him. Apart from these rights and liabilities, the family *sacra* also passed. Though in the Empire these had fallen somewhat into decay, and disappeared altogether when the Empire became Christian, they were of great importance in early law and it is likely that the provision for the family *sacra* rather than the mere devolution of property was then thought of as the main function of the will. Besides the appointment of the *heres*, the will might contain a number of minor provisions. Some of these we have already noticed, e.g., the appointment of *tutores*, and manumissions of slaves. There might also be, and usually were, gifts of money, or money value, to persons other than the *heres*, legatees. The beneficiary under such a gift (*legatum, legatarius*) did not in any way represent the deceased: he was a mere beneficiary. The will might also contain what may be loosely called trust gifts (*fideicommissa*), directions to some beneficiary

under the will to give something to, or to do something for, some other person. These *legata* and *fideicommissa* will be considered after we have dealt with the devolution of the *hereditas*.

65. FORMS OF WILL.

Testamentum in comitiis calatis. This is the earliest recorded form of will. It was made orally, before the *Comitia Curiata*, the assembly of *patresfamilias*, arranged in *curiae*, summoned for the purpose in a special manner (*calata*) on two days in the year, and presided over by the *pontifex maximus*. Little is really known about this form of will. It is uncertain whether the *Comitia* actually voted the will or merely, so to speak, attested it: it is possible indeed that at one time they voted, but that after the enactment of the clause in the XII Tables: "*Uti legassit...ita ius esto*," they merely witnessed. Even the function of the will is not undisputed. It is usually held that it appointed a *heres* and that, at first, this was its sole function, the fact that it determined the devolution of the family *sacra* being the reason for its submission to that public assembly which was specially concerned with the family relations, a consideration which may have prevented the transfer of this function to the *Comitia Centuriata* when that body became the most important popular assembly. The comitial will was obsolete before real history begins.

Testamentum in procinctu. The comitial will was not open to plebeians and could be made only on two days in the year. Some partial relief from these limitations was provided by this will, made by a soldier (and in the ancient organisation almost every adult had his place in the military scheme) before his colleagues in the camp. Still less is known of this will than of the comitial, but it seems to have survived to the seventh century, though it was obsolete in Cicero's time.

Testamentum per aes et libram. The mancipatory will¹. This was the will of the classical age, and it has the further importance that though it was obsolete in the Byzantine age, many of the rules applied at that time both as to form and as to content of wills are hardly to be understood until it is recognised that they were inherited from the mancipatory will. The mancipatory will did not spring into existence with the characteristics which it had in the classical law. Gaius gives us an imperfect account of its

¹ G. 2. 102 sqq.

development, which seems to have been somewhat as follows. At some date, probably long before the XII Tables, men on the point of death, unable to make a true will because there was no imminent sitting of the *Comitia*, adopted the practice of conveying all their property, by *mancipatio*, to a person who is described as the *familiae emptor*, and who is said by Gaius to be *in loco heredis*. Instructions were no doubt given to him as to the disposal of the property or part of it, but it is not clear that these were enforceable, at least by any more direct means than public opinion. Modern views are, indeed, divided on the question whether, at this stage, he was the real beneficiary, as the language of Gaius suggests, or was never more than a sort of trustee. In any case the transaction differed from the modern notion of a will since it was open, operated at once, and was presumably irrevocable. But the mancipatory will of classical law has the form alone in common with this. It was no doubt gradually evolved, and there may have been an intermediate stage in which the directions to the *familiae emptor* imposed an enforceable obligation on him. In the actual will there was a *mancipatio familiae*, but the words differ from those of an ordinary *mancipatio*. The *familiae emptor* declared (the form in Gaius is somewhat corrupt) "*familia pecuniaque tua endo mandatelam custodelamque meam, quo tu iure testamentum facere possis secundum legem hoc aere aeneaque libra esto mihi empti*," the words *aeneaque libra* being, according to Gaius, doubtful. The testator makes a declaration (*nuncupatio*) to the effect that he calls on the *Quirites* to witness that he has made his will as set forth in the accompanying tablets. This assumes a writing and no doubt in the time of Gaius the tablets were ordinarily sealed by the five witnesses, the *libripens* and the *familiae emptor*. But writing was not necessary, though its greater secrecy and security made it almost universal. At what date the will had reached this stage, at which its provisions took effect of their own force and the *familiae emptor* was a mere useless formality, is uncertain, but it is at any rate older than Cicero, and it is said by some writers to be as old as the XII Tables. It should be added that it must be in Latin.

66. The praetorian will¹. We have already seen that the Praetor by his system of possessory remedies protected one in actual

¹ In. 2. 10. 2; G. 2. 119.

enjoyment, with some *prima facie* evidence of right, from interference otherwise than by legal process. A somewhat similar notion seems to have been the origin of the praetorian will. We have seen that it was the usual practice to put the practical part of the mancipatory will into documentary form, with the seven seals already mentioned. A clause in the Praetor's Edict, certainly older than the time of Cicero, provided that if a will was produced bearing the seals of seven witnesses, he would give possession of the estate under it, *bonorum possessio secundum tabulas*. He did not require the formal *mancipatio*, and though, at first, there usually would have been one, it is clear that in a number of cases wills were made satisfying his requirements but not those of the civil law. And whether the actual contents of the will were valid was immaterial. All these matters would be thrashed out by litigation if the position of the *bonorum possessor* was attacked. The practical effect of the grant of *bonorum possessio* was to enable the grantee to get possession of the property, by machinery to be considered later, and thus put him in the position of defendant: any one who disputed his right must do so by legal process. In principle there was nothing in it to prevent the person entitled at civil law, the *heres*, from recovering the property by action. As it is technically expressed, the *bonorum possessio* was *sine re*, in the earlier classical law. But of course the grant would be final and effective, *cum re*, if there was no person entitled at civil law, or if the *bonorum possessor* was actually the person so entitled. It was not till late in the second century after Christ that it was made effective as against *heredes*, and as the date shews, this was not by the Praetor but by the Emperor. But whether it was *cum re* or *sine re* the *bonorum possessor* was for the time being very much in the position of a *heres*. He must carry out the provisions of the will. By praetorian actions devised for the purpose, he could sue and be sued, as if he were *heres*. The Edicts on the matter deal only with property questions. It does not appear that a manumission would be effective under a purely praetorian will and appointments of tutors would probably need to be confirmed. It must be observed that it is not merely in cases of defective formality that the Praetor gave protection by *bonorum possessio secundum tabulas* where the will would be invalid at civil law. Familiar illustrations are those of a woman's will made without *auctoritas* of her *tutor*, and of a

testator who had lost and regained *testamenti factio* between the making of the will and the death¹.

It seems probable that in the fourth century the lax practice grew of neglecting the *mancipatio* and merely alleging it in the document. Wills so made were really only praetorian wills, but they seem to have paved the way for legislation in the fifth century, not well known, by which wills with a certain number of witnesses were given civil effect without any *mancipatio*. About the same time there was legislation authorising wills made *apud acta*, i.e., entered on the rolls of a court, or deposited in the archives, without other attestation. Much more important than these was the so-called Tripartite Will, introduced in A.D. 439², which was the ordinary will of late law. It was said to be made under *ius tripartitum*, as deriving its characteristics from three sources. It must be made in one operation, *uno contextu*, in the presence of seven witnesses, both civil law rules. It must be sealed by the witnesses as in praetorian law, and they and the testator must *subscribere*, i.e., add to the seal a recognition of the act as theirs. The name and *subscripsi* sufficed, but more was usual. This requirement was new. At the same time it was provided that a will might be in either Greek or Latin: by this time the Eastward trend had made Greek the native speech of the majority of *cives*. There were small changes of detail from time to time.

It was possible, at least in later law, to make a purely oral will, but the proof of such a will would be insecure, and it was probably confined in practice to cases of extreme urgency.

For a time in the fifth century a will written entirely by the testator (holograph) was valid without other formality. There were other provisions, from the time of Constantine onwards, allowing informal wills without witnesses where the property was distributed among children, and under Justinian such provisions had to be in the writing of the testator.

There were many statutory relaxations of form for exceptional cases. The *testamentum ruri conditum* allowed fewer witnesses where *cives* were few. In time of pestilence the witnesses and the testator need not be face to face. There was provision for blind testators, for deaf mutes, etc., and, as we shall see, a soldier's will was free of almost all rules.

¹ G. 2. 147.

² C. 6. 23. 21.

67. Capacity. *Testamenti factio*. This expression is used to cover three cases, that of testator, of beneficiary, of witness. It is the capacity to take part in a will.

Capacity to make a will¹ (active *testamenti factio*). The main rule is that all *cives sui iuris* above puberty can make wills and no one else can, but there are exceptions to both halves of the proposition. Those declared *intestabiles* as a punishment, and deaf mutes from birth were excluded, as were those *de statu suo incerti*. Thus a son who did not know that his *paterfamilias* was dead, a freedman who did not know that he was free, could not make a valid will. A woman could not make a comitial will, as she could not appear in the *Comitia*. A *libertina* could make a mancipatory will with the consent of her patron as *tutor*, but an *ingenua* could not till the second century, even with the consent of her *tutor*, unless she had suffered *capitis deminutio* and had thus passed into *tutela fiduciaria*. This rule, whatever its origin, may rest in practice on the fact that her *legitimus tutor* at the time of testation might not, as events turned out, be the relative whom her will disappointed. But from Hadrian's time onward she could make a will with the consent of her *tutor*, and when the *perpetua tutela* of women disappeared she had full right. A lunatic or a *prodigus interdictus* could not make a will, though one made before the incapacity arose was valid. A *captivus* could not make a will: he was a slave, and in strictness his will already made ought to fail. But we have already seen that this was not the rule in practice².

Conversely, there were persons, not *cives sui iuris*, who could make wills. Coloniary Latins could do so, at least if this was provided by the statutes of their community; but Junian Latins were expressly barred from testation by the *l. Iunia*. *Filiifamilias milites* (and, after Hadrian, former *milites*) could devise *peculium castrense*. *Servi publici populi Romani* could devise half their *peculia*. Peregrines could no doubt make wills according to the laws of their various communities, but these would not be Roman wills.

As we have seen, though a will was void if capacity was lost after it was made, even though the power was regained, the Praetor would give in such a case *bonorum possessio secundum tabulas*; *sine re* in the earlier classical law.

Capacity to take under a will (passive *testamenti factio*). Naturally

¹ G. 2. 112, 113; In. 2. 12.

² *Ante*, § 15.

many persons could take under wills who could not make them e.g. children, and slaves, who would acquire for their masters. The principal classes excluded were peregrines and *dediticii*, *intestabiles*, widows who remarried within a year and, in later law, heretics and the children of traitors. There were several cases in which historical distinctions must be taken. By the *l. Voconia* (168 B.C.) women could not be instituted by a testator in the highest class of the Census of wealth. The rule disappeared with the Census itself early in the Empire¹. *Incertae personae*², i.e., those of whose identity the testator could not have formed a notion, e.g., "the first person at my funeral," could not be instituted till Justinian; but "the first of my relatives at my funeral" was definite enough. Unborn persons, *postumi*, are in the texts sometimes called *incertae personae*, but they are really barred on another principle: they could not be *capaces* at the time the will was made. So far as *postumi sui* are concerned, we shall see that the difficulty was gradually got rid of by legislation and jurisprudence, but, for *postumi alieni*, exclusion remained the rule of civil law till Justinian, though the Praetor gave *bonorum possessio secundum tabulas*. Corporate bodies, of which *municipia* are the most important type, could not be instituted in classical law. For this there is the practical reason that the State might not favour the aggrandisement and power which wealth would confer on such bodies, but there were theoretical reasons also. The distinction between the corporation as such and the individual men who made it up was not fully grasped. Thus, as a shifting body, they were *incertae personae*. Ulpian says they could not all give the necessary assent³, and even if the corporate unity is strictly regarded there was the difficulty that the ancient formal acceptance could not be done by agent, and a corporation cannot act otherwise than by agent. They could however, from early in the Empire, take legacies; but apart from *privilegia* to favoured places and some small relaxations, they could not be instituted till the fifth century, while corporate bodies other than *municipia* were excluded till the time of Justinian. In general, deities could not be instituted, but a few exceptions appear in the Empire, in all cases alien deities whose worship had been accepted. When the Empire became Christian the Catholic Church could be instituted, and even particular churches.

¹ G. 2. 274.² G. 2. 238; U. 22. 4.³ U. 22. 5.

In all the foregoing prohibited cases, the *institutio* was simply void, and would not operate even though, where this was possible, the person named became qualified before the death. There is another group of cases on a different footing. Certain persons could be validly instituted, but had not the *ius capiendi*, i.e., the *institutio* would fail unless they passed into the fully qualified class before it was too late to claim. By the *l. Iunia*, Junian Latins instituted could not take unless they were *cives* before it was too late to claim. By the *l. Iulia* and the *l. Papia Poppaea* (A.D. 9) adult unmarried persons (*coelibes*) could take nothing, and childless adults (*orbi*) could take only half their gift unless they satisfied the *leges* in time to claim. Ascendants and descendants were wholly exempt and were said to have *ius antiquum*, other relatives to six degrees (in one case the seventh, second cousins once removed), were so far exempt that they could take what was expressly given to them but not their share of lapses¹. These rules disappeared when the Empire became Christian, since celibacy, the chief of ecclesiastical virtues, could not be so penalised. The rule as to Junian Latins lasted till they disappeared under Justinian.

Capacity to witness a will². Some of the exclusions under this head are obvious. Peregrines, lunatics, *impuberes*, *intestabiles*, and slaves, unless thought by all parties to be free (*error communis facit ius*), were excluded. Other exclusions turn on characteristics of the comital and mancipatory wills but did not disappear with these. Women could not be witnesses; they could not have been in the *Comitia* or have been witnesses to a *mancipatio*. Deaf or dumb persons could not take part in *mancipatio* and thus could not be witnesses. *Prodigi interdicti* could not witness, because they had not *testamenti factio*.

Apart from these general prohibitions, there were exclusions due to the relation of the person to the particular will. No one in the same family group as the testator or the *familiae emptor* could witness. This is merely an application of the rules of *mancipatio*. It has nothing to do, at least as applied in wills, with the prudential considerations which make modern systems exclude attestation by interested persons. Thus the *heres* could be a witness in classical law, though Gaius notes that it is undesirable. It was not till Justinian that he was excluded and, even then, other beneficiaries

¹ U. 16; 22. 3; G. 2. 110, 111.

² G. 2. 105, 106; In. 2. 10. 5 sqq.

were not. There was nothing to prevent attestation by several members of one family and the fact that a witness became *incapax* after the will was made did not affect the attestation. It should be added that the function of the witness was not quite what it is in English law. With us the witness merely attests the signature or other execution of the document. The Roman witness attested the transaction. He was summoned for the purpose and must know that it is a will, though he need not, and usually did not, know what it contained.

A will which broke the foregoing rules or did not institute a *heres* at all was a *testamentum non iure factum* or *iniustum*.

68. *INSTITUTIO HEREDIS*. This was the primary function of the will: no will was valid without it. In classical law it must be at the beginning, in the sense that any provisions which might lessen what came to the *heres* were void if placed before the *institutio*. There were detailed rules for complex cases where there were several *institutiones* and other gifts were interspersed between them. The principle seems to be a reminiscence of the old *familiae emptio*, in which the transfer to the *emptor* was the first step. Under Justinian the order of the provisions was immaterial. In classical law it was not enough to make it clear who was to be *heres*: imperative words must be used; *heres esto*, *heredem esse iubeo* were approved forms. But *heredem facio* or *heredem instituo* would not serve and still less such forms as *heredem esse volo*. In later law any form sufficed so long as the intent and the identity of the nominee were clear¹.

A man could not be partly testate: the *institutio* must cover the whole: if a sole *heres* was instituted to less than the whole, or to specific things, the limitation was ignored: he was *heres* to all. But there were difficulties into which we need not go where two or more were appointed to specific things only.

It was not unusual to appoint several *heredes*, giving to each a share. The ordinary division was into twelve shares, based on the *As* of twelve *unciae*, each *heres* receiving one or more *unciae*, the names assigned to the various fractions, from one twelfth upwards, being *Uncia*, *Sextans*, *Quadrans*, *Triens*, *Quincunx*, *Semis*, *Septunx*, *Bes*, *Dodrans*, *Dextans*, *Deunx*, *As*, which, for the most part, explain themselves. There were further subdivisions with their appropriate

¹ G. 2. 116, 117; C. 6. 23. 15.

names. There was no rule that there must be twelve *unciae*, and thus, if only, e.g., nine *unciae* were given, the testamentary *as* in this case would include only nine *unciae*, which would cover the whole. But the conventional twelve was utilised to solve a question which might present itself. If no express shares were assigned the *heredes* took equally; but if one or more were appointed with assigned shares and others with no mention of shares, those to whom no shares were assigned divided equally all shares not allotted out of twelve or, if twelve or more were already allotted, then all unallotted out of twenty-four, the *as* in such a case being treated as a double *as* (*dupondius*).

Institutio heredis being an *actus legitimus*, it would seem that, in principle, it could not be subject to *dies* or condition, and in fact it could not be subject to *dies certus*: if a *heres* was appointed from a certain day the limit was ignored. *Dies incertus*, i.e. a future time, the date of which is uncertain though it must come (*certus an, incertus quando*) was treated in wills as a condition. *Dies ad quem*, "to be *heres* till a certain time," was struck out on the principle *semel heres semper heres*.

Conditions however were allowed in classical and later law. A conditional *institutio* is one which depends on the occurrence of an event which when the document operates is future and uncertain (*incertus an*)¹.

Impossible, illegal and immoral conditions were struck out: here, as elsewhere, the line taken was to preserve the *institutio* (so as to avoid intestacy) by ignoring the offending modality. But, as we have seen², impossibility is not quite a simple notion: it does not mean impossibility to the person concerned. The impossibility meant is inconceivability. An impossible condition is one *contra rerum natura*, e.g., "if he touch the sky with his finger." It is clear that this must be a shifting notion, for many things inconceivable to the Romans are commonplace to-day. And impossibility means initial impossibility. If a condition became impossible (*casus*) this did not release it. Resolutive conditions were struck out on the principle applied to *dies ad quem*: *semel heres semper heres*. A condition of similar character was the negative condition, e.g., "if he do not go to Capua." Since such conditions, or some of them, might not be settled till the *institutus* died, they would

¹ See *ante*, § 16.

² *Ibid.*

seem to make the *institutio* nugatory, but for the fact that any *heres* conditionally instituted, which would cover this case, might be granted *bonorum possessio secundum tabulas* on giving security that he would restore the property if the condition failed. In later law there was a somewhat similar remedy, the *cautio Muciana*, which in classical law applied only to legacy, and will be considered under that head. Two further remarks must be made as to the validity of conditions. Though, in general, impossibility merely to the party was no objection, there was one exception. If a *pater-familias* instituted his son under a condition which was in fact not within his power, so as in effect to exclude him without formally doing so, this was treated as an omission and the will was void¹. Further, certain conditions avoided the *institutio*. Such were *institutiones captatoriae*, i.e., *institutiones* on condition of being instituted by the *heres* named, and *condiciones perplexae*, self-contradictory conditions, which need not be illustrated.

In general there could be no *aditio* as *heres*, till the condition was satisfied: if indeed it had already been satisfied, the *institutio* was not conditional. But if it was to do something which could be repeatedly done, and the *heres* had done it before the death, it was presumed that the testator's intent was that it should be done after the death². There were however some cases in which the condition need not be satisfied. If the fulfilment needed the cooperation of a third party and he would not act, the condition was regarded as satisfied but this did not cover conditions wholly to be performed by a third party: if he refused, the condition failed³. Where the *heres* was intentionally prevented by a third party interested in non-performance, from satisfying the condition, it was treated as satisfied. At the end of the Republic, it was common to secure the performance of something, not by making it a condition, but by imposing a condition of swearing to do it. From an early date in the Empire, the Praetor remitted such conditions, though, at least in later classical law, in such a case, any actions under the will would be refused until the thing was actually done.

69. *SUBSTITUTIO*. Since there was the possibility that an *institutus* might refuse or die or be disqualified, and intestacy was if possible to be avoided, it was permitted to institute another person for the

¹ D. 28. 2. 28. pr.

² D. 35. 1. 2.

³ D. 40. 7. 4. 7.

case in which the *institutus* from any cause did not take. Such a secondary *institutio* was a *substitutio* (*sub-institutio*) *vulgaris*¹ distinguished by this epithet from other forms of *substitutio* with which we shall have to deal. The simplest form was “*T. heres esto, si heres non eris, M. heres esto,*” and there might be successive substitutions. There might be more than one substitute to a share or a substitute to more than one share. The *institutio* might be conditional and the *substitutio* simple, or *vice versa*. Apart from these complications, the substitute took the share with any burdens there might be on it. As the substitute did not take unless the *institutio* failed (with a few exceptions which do not affect the principle) it was in effect a conditional *institutio* in any case, the condition being failure of the *institutio*. Thus it failed unless the substitute was alive and *capax* when the *institutio* failed. The exceptions above mentioned are these. Where a slave was instituted in the belief that he was free, with a substitute, Tiberius provided that the slave’s owner should share with the substitute. If a common slave was instituted with a substitute and one owner refused, his share would go to the substitute, so that the substitute and the other owner shared. If an insolvent instituted his slave with a substitute, the latter was preferred if he was willing to take, so that here the ordinary rule was inverted, the *institutio* taking effect only if the substitute refused.

The rule *substitutus substituto instituto substituitur*, he who is substituted to the substitute is also substituted to the *institutus*, is practically important if at the time when the share of the *institutus* falls in, the first substitute is already dead. On such facts the substitute’s substitute would have no claim apart from this rule. If however the first substitute refused the share of the *institutus*, the substitute to him would be entitled to claim without appealing to this rule.

It was permitted and usual to substitute *coheredes* to each other. As, on general principle, if an *institutio* failed the share lapsed to the others this might seem an unnecessary precaution, but it served several purposes. It evaded the *leges caducariae*, provisions of the early Empire by which, as has been noted and will be seen in greater detail later, the old law of lapse was much modified and the lapsed share might go to others than the *coheredes*: it might

¹ G. 2. 174 sqq.; In. 2. 15.

indeed go to the *Fiscus*. These laws excluded, *inter alios*, *coelibes*, but near relatives could take what was expressly given to them, though not lapses. *Substitutio* is an express gift, so that a bachelor brother instituted *coheres* could take an unclaimed share if he was substituted, though not if it was a case of lapse. Further, the testator in a *substitutio* could vary the shares, conditions and burdens. Moreover, a *substitutio* being an *institutio*, the benefit was personal. For the *substitutio* to operate the substitute must be alive when the *institutio* fell in. If a *substitutus coheres* entered for his own share but died before another share fell in, his representatives had no claim to this, though they took his share and would have taken the share of the *institutus* if it had been a case of lapse. But though the *institutio* and the *substitutio* of the same person to another share were distinct *institutiones*, if he had accepted either he could not refuse the other: indeed the one entry was in effect an entry on both shares.

*Substitutio pupillaris*¹. This is a rule that a father who has a child *impubes* could, by his will, provide a substitute for the child, if he, outliving the testator, died too young to make a will for himself. It is very ancient and at first it could be done only if the child was instituted, and covered only what came from the testator. In classical law, it covered all the property of the *impubes*; and it could be done even if the child was disinherited. It was in effect making a will for him. It avoided his intestacy, and it might also have the effect of preventing the property from passing ultimately to one whom the testator had himself disinherited. It was common to couple it with a *substitutio vulgaris* in favour of the same person. It might be embodied in the will, but, more usually, it was in a separate document, not to be opened unless the child died *impubes*, a precaution the reason for which is obvious. But in the later classical law, one kind of *substitutio* to a child was held to imply the other, unless the contrary appeared. The question was much debated whether the *institutio* and the pupillary substitution were to be treated as two wills or one. It was ultimately held that while they were distinct *institutiones*, still it was really only one will, and acceptance or refusal of one applied to the other. Other consequences of these distinctions we shall not consider.

¹ G. 2. 179 sqq.; In. 2. 16.

Of the rules applicable to this form of *substitutio*, the chief are that the substitute must be a *certa persona* except that "whoever shall be my *heres*" was enough and the words "under my will" were implied; that though it might be to one disinherited, it could not be to one not in the family; that it failed if the child predeceased the testator; and that, though it might be for the case of death at any age under puberty, it could not be for any age after puberty, when the child became capable of testation.

*Substitutio exemplaris*¹ or *quasi-pupillaris*. This is a somewhat similar, but much later provision for insane descendants, not necessarily *sui*. In the fifth century and perhaps earlier, permission was sometimes granted by the Emperor, on petition, for ascendants to appoint a substitute to a descendant permanently insane, or incapable of testation from some other defect. Justinian allowed it as of right in the case of insanity. The substitute must be a *certa persona*, a descendant of the lunatic; failing such, some descendant of the testator; or, failing such, anyone. If the lunatic recovered, the *substitutio* was void and did not revive on relapse. As more than one ascendant may so appoint, the rule seems to have been that each substitute took what came from his appointor, but it is not clear who took what did not come from any of them.

70. Gaius classifies *heredes* under three heads².

Necessarii heredes. These are slaves of the testator instituted by him, with, in classical law, a gift of liberty, which, under Justinian, was implied. They were *necessarii* as having no power of refusal if appointed. This was of most importance where a testator was insolvent. *Heredes* were absolutely liable for debts, and such a testator, knowing that other *heredes* appointed will probably refuse, would appoint a slave. The bankruptcy would then discredit the successor and not the memory of the deceased. The Praetor protected the slave from the most extreme consequences of the principle by providing that if he applied for *bonorum separatio*, the creditors would have no claim to what he acquired, after he was free, from other sources. But as the creditors suffered at least to the value of the slave, only one such manumission would be valid. On the other hand, a manumission with this aim was not subject to the *l. Aelia Sentia*, but a slave whose manumission was barred by any other rule could not be so utilised.

¹ In. 2. 16. 1; C. 6. 26. 9.

² G. 2. 152 sqq.; In. 2. 19.

Not every slave instituted by his owner was a *necessarius*: he was not such if the master was in any way bound to free him, e.g., under a *fideicommissum*, and if freed or sold after the will was made he was not *necessarius*, but could take or refuse for himself or at the command of his new master, as the case might be.

Sui et necessarii heredes. These were persons in the *potestas* of the testator who became *sui iuris* at his death: *sui*, as being in a sense *heredes* to themselves, on the idea of a sort of *condominium* in the family property, *necessarii* as being, like the slave, *heredes* with no question of acceptance or refusal. Their position differed from that of the *necessarius*, in that the right and liability of the latter depended wholly on the will, while *sui* would succeed inevitably in the same way, even if there was no will. It differed further under praetorian law since the Edict provided a *ius abstinendi*. If they did not intermeddle and made it clear that they did not mean to be *heredes* they were still *heredes* at civil law, but the sale of the property by the creditors would proceed as on intestacy, and all proceedings against the *heredes* would be barred. The will being still valid at civil law, manumissions (if not in fraud of creditors) and pupillary substitutions were still good. The *suus* could change his mind and take up the responsibilities, but Justinian required this to be within three years¹. Any surplus belonged to the *suus heres*.

Extranei heredes. These are all others. They could refuse, and in the meantime the *hereditas* was said to be *iacens* and to be offered (*delata*) to them. If and when they accepted they were *heredes* for all purposes. Acceptance was, in general, irrevocable, but a minor and one compelled by threats to accept (or refuse) could get *restitutio in integrum*. Hadrian² allowed *restitutio* in a particular case where a heavy debt came to light after acceptance, and this became a general rule for *heredes milites*, but not for others. Mere fraud gave no *restitutio*, but only an *actio doli*.

Extranei heredes must have *testamenti factio*, both when the will was made and at the time when acceptance was possible, and thenceforward till actual entry. Loss and regaining of capacity between the first two dates was immaterial, but loss was fatal during *delatio*. *Postumi* created a difficulty, as they were clearly not *capaces* when the will was made. At first no *postumus* could be

¹ C. 6. 31. 6.

² G. 2. 163; In. 2. 19. 6.

instituted, but, for *postumi sui*, there was a gradual relaxation, to be considered later. *Postumi alieni* could not be instituted validly at civil law, though the Praetor would give *bonorum possessio secundum tabulas*. It would not always be clear whether a *postumus* would be *suus* or *alienus*. Thus a posthumous grandson by a son would be a *suus* if his father died before his grandfather. Whether therefore the *institutio* of such a person was effective or not would depend on the event. Under Justinian, however, *postumi alieni* could be instituted. A *postumus* is any person born after the will is made, but here, as in all cases, there was a limit of lateness: no person could succeed unless he was actually conceived at the time of *delatio*.

We have seen that *servi alieni* could be instituted: their *testamenti factio* is derivative from that of their master. It follows that the master must have *testamenti factio*, and of course his authority was necessary to entry by the slave. Several joint owners would acquire *pro rata*, if they authorised; and one entry with the approval of all sufficed for all. But the slave himself must enter: the owner could not do it for him. A certain complication arose if a *servus communis* was instituted by one of his owners. If, in classical law, there was no gift of freedom, he acquired simply for the other owner. If there was a gift of liberty the effect in classical law is uncertain, but, under Justinian, he became free and took the *hereditas*, the other owner receiving compensation for his interest in the slave himself¹.

We have seen that where the *heres* is *extraneus* there is a time during which the *hereditas* is *iacens*, having no owner; and this might, especially if the *institutio* was conditional, be a long time. Provision was necessary for both the protection of the property and its administration. The right of a conditional *heres* to get *bonorum possessio secundum tabulas* provided for this, but there would normally be some delay, apart from conditions. So far as protection of the property was concerned there was the difficulty that *res hereditariae*, having no owner, could not be the subject of theft: we have seen that under the law of *usucapio pro herede*², anyone could take them. But soon after Hadrian practically abolished this *usucapio*, a procedure was introduced, the *crimen expilatae hereditatis*, precisely to deal with this case. And the *heres* was, some-

¹ U. I. 18; 22. 7, 10; C. 7. 7. 1. 1.

² Ante, § 47.

what illogically, allowed on entry to bring the Aquilian action for damage to the property in the interval¹. But the administration of the estate was otherwise provided for. The *hereditas iacens* was more or less personified, not, indeed, thought of as a person, but as representing a person. By Justinian's time it was occasionally spoken of as actually owner of what it contained. This partial personification solved the problem. The *hereditas* could continue possession and even complete *usucapio*². The slaves in it, *servi hereditarii*, could act for it as for an ordinary master, subject, however, to some important limitations. A *servus hereditarius* could not accept a *hereditas* to which he was instituted: there was no one to authorise. He could not stipulate for a usufruct for the *hereditas*: there was no life to which it could attach. He could not acquire possession for the *hereditas* except *in re peculiari*, perhaps even under Justinian. But, in general, his contracts bound the *hereditas* as if he had an owner living, i.e., by praetorian actions: even a living owner was not civilly bound. His acquisitions went to the *hereditas*, his *peculium* continued to exist, and, apparently, if he had a right of alienation of it (*administratio peculii*) this continued. But all acts of the slave depended on the entry of the *heres*. It was only on entry that any legal proceedings could be brought on them, and, if no *heres* entered at all, all the slave's acts were void.

We have said that the *hereditas* represented a person: it was evidently a disputed point whether this was the *persona* of the deceased or of the future *heres*. The view prevailed that it was that of the deceased, though this is difficult to reconcile with the principle, also accepted, that the entry of the *heres* was retrospective. The conflict is brought out in contracts in which the slave acted in the name of the *heres*. Some texts make this valid, others void²; and the issue is, clearly, which *persona* the *hereditas* represented. He could not indeed contract in the name of his late master: there was no such person. But he could contract in his own name, or in that of a fellow slave or with no name at all.

71. Entry on the *hereditas*. *Aditio*³. The intention to accept must be in some way expressed by the *institutus*, not by representative other than slave or *filius*. This was inconvenient if the *heres* was

¹ D. 9. 2. 43.

² D. 2. 14. 27. 10; 45. 3. 28. 4 etc.

³ G. 2. 162 sqq.; In. 2. 19. 5 sqq.

infans or insane, though the inconvenience was lessened by the fact that the *tutor* or *curator* could get a grant of *bonorum possessio* on behalf of the ward, which would enable him to look after the property. But, on what seems the better view, this was in both cases, in classical law, merely provisional, and would be void if the ward died without making actual *aditio* (*bonorum possessio decretalis*).

In early law, entry on a *hereditas*, like most other significant legal acts was necessarily formal. It took the form of *cretio*, a solemn declaration of acceptance: "*quod me Publius heredem instituit, eam hereditatem adeo cernoque*" normally of course before witnesses, though it is not clear that these were legally needed. But by the beginning of the Empire, apart from express direction in the will, entry might be made by *pro herede gestio*, the proper meaning of which seems to be doing some act of administration, as *heres*. By the time of Gaius it might be by mere declaration, *nuda voluntas*. There does not seem to have been any limit of time: Gaius describes *usucapio lucrativa* as a rough mode of compelling promptitude. But the Praetor, on the application of persons interested, would impose such a limit, *spatium deliberandi*, not less than 100 *dies utiles*, or, normally, more than nine months. One who had not claimed within the time was excluded, not indeed at civil law, but by the Praetor, who would refuse him any action or other means of enforcing his rights, without which his position as *heres* was a mere empty name.

While any form of entry sufficed unless there was a contrary direction in the will, such a direction was usual. It was the practice, dating no doubt from a time before the Praetor's *spatium deliberandi* was invented, a time when solemn declaration (*cretio*) was the only mode of acceptance, for the testator to impose a requirement of *cretio* within a certain time. This is the main application of *cretio* in classical law. The time allowed was in the testator's discretion, though the Praetor would cut down an unduly long time. The usual time was 100 days and the most usual form of *cretio* clause (*cretio vulgaris*) allowed only *dies utiles* to count (*quibus scies poterisque*). But there was another form in which every day counted (*cretio continua*) so that an *institutus* who was from any cause prevented from acting might be barred by no fault of his own. The mere *cretio* clause, being a direction only, and not a condition, would have been useless: it was made effective

by the addition of the words *si non creveris, exheres esto*, which had the effect of excluding the *institutus* if he did not obey the direction. But it was necessary also to provide against failure of the will from omission to make *cretio*, and the *cretio* clause was usually accompanied by a *substitutio*. Thus the form would be in effect: "Let *T* be *heres*, and let him make *cretio* within 100 days: if he do not so make *cretio*, let him be disinherited, and let *X* be *heres*." If *T* did not make *cretio* within the time, he was excluded even though he did some act of informal acceptance, and *X* might claim. But Gaius tells us that a shorter form was sometimes used, without the words *exheres esto* (*cretio imperfecta*) and the effect would necessarily be different. If *T* made *cretio*, *X* was excluded. If *T* did not make *cretio* or accept in any other way, *X* could claim the whole. But if *T* did not make *cretio*, but did accept informally, he was entitled, for he had accepted, and *cretio* was not a condition. On the other hand the condition on which *X* was instituted had happened, for *T* had not made *cretio*. Thus, in the time of Gaius they shared. But M. Aurelius did away with this logical result by providing that where the *cretio* clause was *imperfecta* any form of acceptance by the *institutus* should suffice to exclude the substitute¹.

In the absence of the *cretio* clause, any *institutus* who, while the time within which he could claim was running, refused or repudiated the *hereditas*, was at once excluded. But if there was such a clause, such an act of repudiation was inoperative: the *heres* could still make *cretio* within the time and claim the *hereditas*. It was also held by some jurists, though the authority of Sabinus was against it, that where the *cretio* clause was *imperfecta* and the *institutus* accepted informally he had thereby admitted the substitute to a share and could not afterwards fall back on *cretio* and so exclude him. In any case the rule of M. Aurelius put an end to the question.

All the law of *cretio* had disappeared under Justinian, and its post-classical history is obscure. It is not clear that the *cretio* clause survived the mancipatory will, and, apart from the clause, *cretio* served no purpose, so that it probably died out of ordinary practice. But early in the fifth century a rule appeared requiring actual *cretio* where an inheritance fell to a young child in *potestas*. The reason for this is controverted. The rule was abolished in A.D. 407 and this seems to be the last trace of *cretio*.

¹ Ulp. 22. 34.

The effect of *aditio*, which was in general, as we have seen, irrevocable, was that the *heres* stepped into the legal shoes of the testator. He was liable for all debts, even though they exceeded the estate, so that the *hereditas* might involve a loss (*hereditas damnosa*). He acquired the assets of the estate. But these general propositions need limitation. The *heres* did not of course step into the social and official relations of the deceased: he was not Consul because his testator was. Some rights were ended by the death, e.g., usufruct and the right of an *adstipulator*¹, and a right of action for insult. Some liabilities were ended, e.g., those on delict, apart, at any rate, from profit the *heres* had received; those on some forms of surety², the widow's claim for recovery of *dos*, in classical law, and some others. Moreover, some rights did not necessarily pass to the *heres*. Thus, legacies in a certain form vested at once in the legatee and never belonged to the *heres*. The right of succession to a freedman, not yet dead, passed to *liberi*, whether they were *heredes* of the patron or not.

The *heres* had also to carry out the directions of the will, so far as the estate would go. Many of the provisions of the will, e.g., direct manumissions, appointments of tutors, and some legacies, operated of their own force as soon as *aditio* was made; but others were imposed as a duty on the *heres*.

If the *heres* chanced to be insolvent the creditors of the deceased might suffer, though the estate was solvent, since they would have to share with creditors of the *heres*. Accordingly the Praetor allowed a creditor to apply for *bonorum separatio*, i.e., that the two estates might be kept distinct till that of the deceased was wound up. The application must be made within a reasonable time: in later law there was a limit of five years³.

The position of the *heres* was profoundly altered by an innovation of Justinian, in A.D. 531, the *beneficium inventarii*⁴. If the *heres* made an inventory of the estate beginning it within a month and completing it within three he was not liable beyond the assets, becoming a sort of executor and residuary legatee. If he did not make one, he was under the old law, but was forbidden to avail himself of the legislation limiting the amount of legacies, etc. And if he let the time of claim go by without declaring himself, he was regarded as accepting, instead of, as in earlier law, refusing.

¹ *Post*, § 103.² *Post*, § 144.³ D. 42. 6. 1. 12, 13.⁴ C. 6. 30. 22.

The *heres* could sue debtors, and be sued by creditors, of the estate. But he had also a general action, *hereditatis petitio*, for the *hereditas* as a whole or any part of it, against any *possessor pro herede* or *pro possessore*, i.e., any one who set up an adverse claim to the *hereditas* or who held without alleging any title at all. Against one who claimed that the property was his by some other title, the only course was to "vindicate" the specific things. In the earlier classical law the unsuccessful defendant in *hereditatis petitio* had to account for all receipts and for all damages due to negligent administration, but after the *Sc. Inventianum* of A.D. 129 a distinction was drawn. A defendant in good faith had to account only for his enrichment: one in bad faith must account for everything. And the *Sc.* seems to have allowed the action to be brought not only against an actual possessor, but against one who had *dolo malo* ceased to possess¹.

72. Joint *heredes*. We have already seen how the shares were arranged. The XII Tables provided that in regard to debts due by or to the estate the *heredes* were liable and entitled in proportion to their shares. But the testator could modify the working of this rule by expressly charging particular debts or legacies on a particular *heres*. It is clear that some limitation of this right was needed, or the testator might so distribute the burdens as practically to exclude a *heres* from any actual nett advantage, whatever his nominal share was, a simple way of circumventing the rules which we shall shortly consider, giving certain relatives an indefeasible right to a certain share of the *hereditas*. Such a limitation was in fact provided. The *l. Falcidia*, which limited legacies to three-quarters of the estate was applied separately to each *heres*. This did not affect specially charged debts, but an analogous rule was applied. Any special charge of debts on a particular *heres* was treated as if it were a legacy to the other *heredes* and was cut down to the same extent as if it had been such a legacy².

The immediate effect of entry was that the *heredes* became common owners of all the property. It was possible and in early law usual, at least among *sui*, for them to continue to hold it in common (*consortium*). But such common life as is involved in *consortium* is suitable only to a rather primitive civilisation, and in historical times division was usual. This would normally be by

¹ D. 5. 3. 20. 6 sqq.

² D. 10. 2. 20. 5.

agreement among the *heredes*, and literary texts contain many allusions to such arrangements. Where, for any reason, this was not possible, and an appeal to the courts was needed, the machinery was a *iudicium familiae erciscundae*¹. In the action the *iudex* was empowered, by a clause (*adiudicatio*) in the *formula*, to allot the property among the *heredes* according to their shares. Equalising payments might be ordered, and allowances, for expenses incurred. And, though the action had, in strictness, nothing to do with debts either way, it was usual for the *iudex* to assign debts and claims among the different *heredes*. This did not in law deprive each *heres* of his right to sue for his share of any claim, nor did it bind creditors. But one action is more convenient than many, and the practice was for the other *heredes* to give to the *heres* to whom a debt or claim had been assigned, authority to act as their representative in any litigation on the matter. This practically gave the same result as if the assignment had been fully operative by law.

Lapsed shares. If of several *institutiones* one or more were void, the void *institutiones* were, in all periods, treated as non-existent (*pro non scriptis*): the will was construed without them. But where a gift, initially valid, became ineffective because the *heres* refused or became disqualified or died before the testator, or from any other cause, there was a lapse, the treatment of which varied greatly at different periods. In the Republic the rule was as in the case last stated: the lapsed gift was *pro non scripto*, and legacies charged on it failed. But the *ll. caducariae* of the time of Augustus, the *l. Iulia (de maritandis ordinibus, 18 B.C.)* and the *l. Papia Poppaea (A.D. 9)*², the provisions of which can hardly be disentangled, made a great change. Besides, as we have seen, creating new causes of lapse, these *leges* set up new rules as to the destination of all lapses, whether due to their rules or not. They were no longer to go under the old rule of *ius accrescendi*. Whether the lapse occurred after the death of the testator (*caducum*) or before (*in causa caduci*), they were to go to *coheredes* with children, failing these to legatees with children, and failing these to the *aerarium*. The devolution differed from that under *ius accrescendi* in that it could be refused and, if accepted, carried the burdens too. The new rules were not to apply to ascendants and descendants

¹ D. 10. 2.² U. 13-17.

to three generations: these were said to have *ius antiquum*, and could take lapses as under the old law, whether they had children or not. About the end of the second century the imperial treasury (*fiscus*) was substituted for the popular treasury (*aerarium*). There is some evidence that Caracalla suppressed the rights of *heredes* and legatees with children, but, if so, they were restored not long after. Celibacy and childlessness, as causes of lapse, disappeared when, under Constantine, Christianity became the official religion. There was legislation on the matter in the following centuries, and the various *praemia patrum* did not wholly disappear till the time of Justinian. He restored the old system of *ius accrescendi* with the variation that the lapsed gift now carried its burdens with it¹.

For these rules to be applied it was necessary that there should be an actual lapse: thus their application could be avoided by substitutions. And they had no application if the whole of the gifts lapsed: this created intestacy². Nor did they apply if the case was one not of lapse, but of forfeiture. The important case of this is forfeiture for *indignitas*, e.g., where a testamentary *tutor* excused himself, he forfeited for *indignitas* any benefit under the will. There were other cases; and the destination of the forfeited gift was not always the same. It was in no case governed by the *ius accrescendi* or the *leges caducariae*. Another case in which lapse was avoided was that of *transmissio hereditatis*. This was a right, for the *heres* of the *heres* to claim where the latter had died without doing so. There were a few cases of this in classical law, but they express no general principle. In A.D. 426, however, the *paterfamilias* was allowed to claim where a mother's succession had fallen to an *infans* who died *infans*. A wider rule was laid down in A.D. 450. Where issue were instituted and died before the will was opened, their issue could claim. Finally, in A.D. 529, Justinian provided that if an *institutus* died within the time for claim, not having claimed, his successors could claim before it expired³.

73. RESTRICTIONS ON THE POWER OF TESTATION. The claims of *sui* were so far recognised from early times that they could not be excluded from the succession except expressly⁴. The rule of civil law was that sons in *potestas* must be instituted or disinherited *nominatim*, otherwise the will was void (*testamentum nullius*

¹ C. 6. 51. 1.

³ C. 6. 30. 19. 1.

² See G. 2. 144.

⁴ G. 2. 123 sqq.; In. 2. 13.

momenti). For all other *sui heredes* a general disherison clause sufficed—*ceteri exheredes sunt*—but if this was not inserted the will was not void, but any such omitted person was entitled to come in and claim as if instituted, taking equally, i.e., a *pars virilis* as against *sui instituti*, and half the *hereditas* as against *extranei*. This is not a breach of the rule, *nemo pro parte testatus*, for these persons were bound by the other provisions of the will. *Nominatim* does not mean “by name,” but by some clear and identifying description, and though the exact words *exheres esto* were needed in classical law, any form with the same meaning sufficed under Justinian. So strict was the rule, that death of an omitted son, before the testator, would not, on the Sabinian view, which prevailed, save the will. The rule as to the share taken by other *sui omitti* is crude, at least as stated, and will be found on analysis to give inequitable results in some cases.

Since a considerable time might elapse between the act of testation and the death, it was possible that *sui heredes* might come into existence who were not born or conceived when the will was made (*postumi*), and persons might become *sui* who were not such at that time, e.g., grandchildren whose father died meanwhile (*quasi postumi*). Such persons, at least the first class, being *incapaces*, and perhaps thought of as *incertae personae*, could not be instituted or disinherited by anticipation. The appearance of such a person, son, daughter or grandchild, upset the will, a harsh rule which may be due to the view that they were not thought of, and that if they had been a different will would have been made. Somewhat illogically, in view of the rule for sons omitted, death of the *postumus*, before the will operated, saved it. Gradually, partly by legislation, partly by juristic construction, relief was provided. One case was dealt with very early. Children or grandchildren born after the testator's death (provided in the latter case that the father was dead when the will was made) could be disinherited or instituted by anticipation (*postumi legitimi*), and if it were a daughter or a grandchild the *ceteri* clause would cover the case, provided, says Ulpian, that something was left them to shew they were not forgotten¹. Aquilius Gallus devised a form instituting or disinheriting grandchildren born after the death whose father died between the testation and the death and this was extended to cover

¹ U. 22. 19.

all remoter issue born after the death who would have been *sui heredes* if then alive. The *l. Iunia Velleia* (A.D. 26) provided for two cases, persons born *sui* between the will and the death (*postumi velleiani primi capitis*) and grandchildren born before the will, becoming *sui* after it by the passing of their father out of the family in the life of the testator (*postumi velleiani secundi capitis, quasi postumi*). Julian held that these provisions made it possible to provide for grandchildren born after the will but before their father's death; and the rule of the later classical law was that anyone who became a *suus heres* after the will, in the course of nature, so far as he was concerned, could be dealt with by anticipation¹.

All this did not affect the case of those voluntarily introduced into the family after the will, by adoption or the like. Disherison of these was meaningless, and anticipatory *institutio* of them did not save the will. But Hadrian in a particular case confirmed such an *institutio* and this was accepted as a general principle, so that the rule of later law was that *adoptio, erroris causae probatio*, etc., would not void the will if the person concerned had been previously instituted, though previous *exheredatio* would have had no saving effect².

Praetorian changes. The foregoing rules deal only with *sui*, and express civil law notions. The Praetor, paying more attention to the blood tie than to the civil tie, introduced new rules giving similar protection over a wider range of cases. But the Praetor could not directly affect the *hereditas*: he could not make or unmake a *heres*. He gave *bonorum possessio contra tabulas*, where civil law gave no right, just as he gave *bonorum possessio secundum tabulas*. But there is the difference that while the latter was ineffective against a *heres (sine re)* till Antoninus Pius, *bonorum possessio contra tabulas* seems to have been effective (*cum re*) from much earlier times. His rules may be briefly stated as follows:

1. Male *sui* must be disinherited *nominatim*, if not instituted: for females the *ceteri* clause sufficed.

2. In either case if this was not done, the omitted person could upset the will by *bonorum possessio contra tabulas*.

3. Some persons not *sui* have the same right, *emancipati*, children left in the family by the testator, when himself emanci-

¹ U. 22. 19; D. 28. 2. 28, 29.

² G. 2. 140; D. 28. 2. 23. 1.

pated, his children emancipated by the grandfather, etc. Adoptive children emancipated had no claim nor had a child given in adoption and still in the adoptive family.

4. Any person *sui iuris* obtaining *bonorum possessio contra tabulas* must make *collatio bonorum*¹, i.e., must, as he has had the power of acquiring property, bring in for division any property he has, if the *institutus* is a *suus* and the claim lessens his share. But he makes no *collatio* unless he benefits. The *suus* is not injured if the share he had under the will was no more than he would have on intestacy. The claimant does not benefit if he loses other benefits under the will, in the shape of legacies, etc., as great as what he gets on the intestacy. Even a person under *potestas* may have to make *collatio*: a daughter must account for her interest in her *dos*. But no *collatio* need be made of military earnings or the like, since such acquisitions were equally open to those in *potestas*. All this praetorian *collatio* died out in practice in the later Empire, the economic position of *filiifamilias* having so much changed.

5. Under *bonorum possessio contra tabulas* the rules of intestacy governed, but some parts of the will stood good, e.g., disinheritances, pupillary substitutions and legacies to some near relatives. Manumissions ordinarily failed, and appointments of *tutores* needed confirmation.

It will be seen that the Praetor's changes, besides ignoring the civil tie, put women on much the same level as men. Antoninus Pius however imposed a limitation: a woman was not to get more under these rules than under the old law². This might happen where *extranei* alone were instituted, and if there were legacies not saved in *bonorum possessio contra tabulas*. In the case of *emancipatae* this was understood to mean, no more than they would have had under the old law had they been *suae*.

The rules under Justinian are simple. All *exheredatio* of *sui*, *postumi*, *emancipati*, etc., must be *nominatim*; the *ceteri* clause was gone. If this was not done the will failed, in the case of *sui* and *suae*, absolutely, in other cases to the extent stated under the praetorian rules.

74. Material restrictions. The foregoing restrictions are formal: they do not restrict the power of the testator, but they force him, if he wishes to exclude certain claims, to do so expressly. There

¹ D. 37. 6.

² G. 2. 126.

were other material restrictions which could not be so evaded. Of these, by far the most important is due to the *querela inofficiosi testamenti*¹. This was a procedure by which, however carefully the forms had been complied with, some near relatives, who had obvious claims, might attack the will as being contrary to natural duty (*inofficiosum*) and get it set aside. The process is said to be based on the idea that the testator must have been insane, but this is not logically worked out, for though the will was sometimes altogether set aside there were cases in which it remained partially good. The action was tried before the *centumviri*, like *hereditatis petitio*, and it is a debated question whether it was really an independent action (*querela* is an odd name for this), or whether it was merely a special basis for *hereditatis petitio* in classical law, as it certainly was in the Byzantine age. Perhaps the more probable view is that it was essentially no more than this, but that there was a preliminary judgment on the point raised in the *querela*, according to the result of which the *hereditatis petitio* would proceed or not. The institution is not primitive: the idea it expresses is not, and we know little of it from classical sources. Since it reflected on the deceased, it was allowed only as a last resource: e.g., a *suus omissus* could not bring it, as he had his remedy under the rules just stated. In general, no one could bring it unless he was entitled on intestacy, though, in later law, and perhaps in classical, if the person primarily entitled refused to claim or was justly excluded, the person next entitled might bring it for his own benefit, if he was within the classes to whom it was open. The relations who might bring the *querela*, if entitled on intestacy were:

1. Descendants, unjustly disinherited, in a man's will, or unjustly omitted in a woman's, including *postumi*.
2. Ascendants unjustly omitted.
3. Brothers and sisters unjustly omitted if some base person (*turpis persona*) is preferred to them. In classical law this applied only to those of the whole blood still agnatically connected, but Justinian applied it to cases in which the agnatic tie was broken, and to half brothers by the same father.

In classical law, total exclusion was not necessary: the *querela* lay if the claimant was to receive less than one-fourth of what he would have had on intestacy, called the *pars legitima*, and possibly

¹ In. 2. 18.

first definitely fixed on the analogy of the *quarta Falcidia*, the quarter which the *l. Falcidia* preserved to *heredes* against legatees. Indeed the *pars legitima* is sometimes called the *quarta Falcidia*. Anything given by the will, and *donationes mortis causa* were reckoned in the *pars legitima*, and, in later law, *dos*, *donatio ante nuptias* and some other gifts. Where the will gave too little but contained a provision that shares below this were to be made up, the *querela* was not available, but there was an action called the *actio ad supplendam legitimam*, by which the increase might be recovered, the will being unaffected. Justinian applied this clause in all cases, so that, under the Institutes, the *querela* lay only if the claimant had nothing at all towards the *pars*. He also, soon after, provided a fresh minimum for children, one-third if there were four or less, one-half if more than four¹.

If the exclusion was held just the *querela* failed and there were many other conditions which would exclude it, e.g., death without taking steps, compromise with the *heres*, abandonment of the *querela* once begun, and a certain lapse of time. This was at first two years, and, later, five, though it might be extended by the Emperor. And recognition of the will, e.g., by accepting a benefit under it, barred the *querela*, but acceptance of a benefit by a *tutor* for his ward did not bar a claim he might himself have, nor would acceptance of a legacy to him bar a claim on behalf of his ward.

Effect of the *querela*. Where there was but one *institutus* and one person entitled to claim, a successful *querela* avoided the will altogether, except that, if the time had been extended by the Emperor, any manumissions which had taken effect remained good. If the claim failed, any benefits of the claimant under the will were forfeited to the *Fiscus*, for *indignitas*. But this penalty applied only if the *querela* was pressed to judgment, and only where the claimant was acting on his own behalf, with the result that if a *tutor* claimed on behalf of a ward, and failed, neither he nor the ward suffered the penalty.

The result is more complex where a claimant succeeds against one *heres* and fails against another, e.g., where a brother brings it, and only one of the *heredes* attacked turns out to be a *turpis persona*. Here the will stood partly good: in effect the deceased is *pro parte testatus*, but this is explained away on the ground that the will is

¹ Nov. 18. 1.

not *pro parte* void, but *pro parte* set aside. Gifts specially charged on the *institutio* set aside failed: apart from this, manumissions stood good and legacies were good *pro rata*. The result was similar if the claim was brought against only one of several *heredes*. Where two persons might bring it, but only one did, or where two claimed but only one succeeded, the result is not quite clear. Probably the will was *pro parte* set aside. A claimant who failed in any case lost his benefits, but did not affect others.

In A.D. 542 great changes were made¹. Nothing counted towards the *legitima portio* unless the claimant was actually instituted *heres* to a share: if he was, all that he took *mortis causa* counted. The exclusion was reckoned unjust unless it specified the ground, and this was one of a number set out in the enactment. If the case for the *querela* was made out, all the *institutiones* were void but other provisions stood. This resulted in what was impossible in earlier law—a will with no valid *institutio*. But the new rules applied only to ascendants and descendants: brothers and sisters were under the old law.

It has been suggested that this enactment is a fusion of the rules of the *querela* and those of *exheredatio*, but the better view seems to be that both sets of rules survived, the new rules having no application if a *suus* or *emancipatus* was merely omitted. The point was important, as the *querela* was barred in five years, the ordinary *hereditatis petitio* only in thirty.

Other material restrictions must be mentioned. The *quarta Antonina* of *adrogatus impubes* has been considered. The patron (and presumably *parens manumissor*) had indefeasible rights to be considered later². A widow without *dos* was given an indefeasible right to a certain share, by legislation of A.D. 537 and 542, with a corresponding right for a widower without *donatio propter nuptias*³. By a *sc. Afinianum*⁴ a rule was introduced that one who adopted one of three brothers was bound to leave him a quarter in any event. The will was unaffected, but an action lay against the *heres* if the rule was broken. There are various opinions as to the basis of the rule, which was abolished by Justinian when he recast the law of *adoptio*.

75. Failure of the will. A will not made in valid form, or not appointing a *heres* was never a will at all and creates no difficulty.

¹ Nov. 115. 4.

² *Post*, § 88.

³ Nov. 53. 6.

⁴ In. 3. 1. 14.

A will which broke the rules of *exheredatio* and therefore failed, also creates no difficulty, apart from the case of *postumi*. But where a *postumus* supervened after the entry of the *heres* and the will therefore failed (*testamentum ruptum*) there is difficulty. So far as concerns manumissions and legacies operating on the entry, the rule was that they were as if they had never been. But if the *heres* freed one of his own slaves, under a *fideicommissum*, it seems that even if the will subsequently failed the manumission was good, and, presumably, the same principles would apply where a will was set aside by the *querela*.

There were other ways in which a will might fail. *Testamentum irritum* is an expression which covers all cases of failure after making, but was in practice applied to two cases, that of a testator who suffered *capitis deminutio*, whose will was nullified at civil law, though the Praetor might give *bonorum possessio* if capacity was recovered, and the case in which no *heres* entered, also called *testamentum desertum* or *destitutum*. Here too legacies and manumissions were void, though there was relief in the case of *addictio bonorum*¹, and if the *heres*, also entitled on intestacy, refused so as to take free of legacies, etc., or the *heres* refused for a price, or by collusion with the *heres ab intestato*. In these and a few analogous cases there was machinery by which the gifts could be made effective.

A will might be revoked (*testamentum ruptum*). In classical law a will could be revoked only by making another, a result of the mancipatory form, which was irrevocable, but did not exclude alteration of the accompanying document, originally instructions to the *familiae emptor*. A valid second will revoked the first, and, even though the second will subsequently failed, the first was not revived, apart from imperial intervention. But Severus provided that if, in a second will, the *institutio* was *ad certam rem*, this limitation was not ignored, as it usually was, but the *heres* under the second will was under a *fideicommissum* in favour of the *heres* under the first, to hand over all but the named property with enough added, if necessary, to make up a quarter of the *hereditas*².

But though a will as to which the testator, without making a second, had clearly shewn, by cancellation of the provisions, breaking the seals, or similar acts, that he did not desire it to

¹ *Post*, § 93.

² *U. 23. 2*; *In. 2. 17*.

operate, was still good at civil law, the Praetor refused *bonorum possessio* under it, and he would give *bonorum possessio* under a first will, if a second will had been so revoked with intention to revive the first. As we have seen such *bonorum possessio* would be *sine re* till the time of Antoninus Pius, and it is to be presumed that the refusal of *bonorum possessio* under a revoked will would not, before that time, have prevented the *heres* under it from proceeding by way of *hereditatis petitio*¹.

With the disappearance of the mancipatory will, the logical irrevocability disappeared also. In A.D. 418 the strange rule was enacted by Honorius that every will should be revoked by the lapse of ten years. In A.D. 439, Theodosius, in a comprehensive enactment on wills, provided that a will in favour of persons not entitled on intestacy should be revoked by a later, in favour of those who were so entitled, even if the second will were defective in form, so that it could not itself take effect otherwise than as a *fideicommissum* binding on the *heres ab intestato*. Justinian retained this rule, but for that of Honorius he substituted a provision that a will could be revoked after ten years by declaration in court or before three witnesses. The praetorian rules of revocation by acts of intentional destruction were still operative and produced complete revocation².

¹ G. 2. 151a; D. 37. 11. 11, 12.

² C. Th. 4. 4. 6; Nov. Theod. 16. 1; C. 6. 23. 21; C. 6. 23. 27. 2.

CHAPTER X

THINGS. WILLS. LEGACIES, ETC.

76. Whatever view we take of the history of the notion of the *universitas iuris*, as stated by Justinian, i.e., of the *hereditas* as the legal position passing to the *heres*, it is at any rate clear that, in all ages of which we have any real historical knowledge, the main function of the will was the appointment of a *heres*, and, with the limitations already indicated, this *heres* was in fact invested with the rights and liabilities of the deceased. It is possible that at one time this was the sole function of the will, but, as we know it, it commonly contained a number of other provisions. We have already considered the manumission of slaves and the appointment of *tutores*. What we have now to discuss are gifts of property (in a wide sense) which are gifts and nothing more. They do not impose on the beneficiary any liability for debts or give him any right to claim from debtors to the estate: they do not, in fact, to use the language of Justinian, constitute the beneficiary a *successor in universum ius*. Such a gift would usually be of some specific thing or quantity or of a right to some service, but even where it was a gift of a fraction of the estate, the beneficiary in no way represented the deceased. He was merely entitled to his proper fraction of the nett estate. These gifts are of two distinct types: *legata* and *fideicommissa*. *Legata* are at least as old as the XII Tables (“*uti legassit suae rei, ita ius esto*”) but *fideicommissa*, as gifts enforceable under the private law, are of the age of Augustus.

LEGATA. Form. Like other ancient institutions of the civil law, *legata* were subject to elaborate rules of form¹. They were required to be expressed in Latin, till, in A.D. 439, it was permitted to make wills in Greek. Any *legatum* which preceded the *institutiones* was void in classical law, but this rule was abolished by Justinian. More important are the rules as to the different forms in which, in classical law, *legata* could be made, each form having its specific effects. There were four such forms, of which two were ancient, the other two being modifications of these. The forms were:

¹ G. 2. 192 sqq.

(a) *Legatum per vindicationem*. This is a direct gift, of which the original form is “*do lego rem Titio*,” but Gaius tells us that, by his time, though the matter had been disputed, the forms “*rem capito, sumito, habeto*” were equally effective. A simple legacy in this form transferred the ownership to the legatee, so that, to express the fact, as the Romans usually did, in terms of procedure, the legatee had an *actio in rem*, a *vindicatio*. As to the point of time at which this occurred there was dispute. The Proculians held that the *res* belonged to no one (*res nullius*) till the legatee had accepted or refused, which fact would settle the question for the future, and probably for the past, so that *heres* or legatee would be entitled to interim fruits, as the event turned out. The Sabinians held that the *res* vested in the legatee on the entry of the *heres*, but divested if the legatee refused, when the gift was treated as never having existed. Gaius says, resting on a very inconclusive enactment of Pius, that the Proculian view prevailed, but it is clear from other texts¹ that this was not so—the Sabinian view was accepted. If the legacy was conditional, the ownership could not pass till the condition was satisfied. In the meantime, for the Proculians, it was a *res nullius*. For the Sabinians, it belonged to the *heres*, and this view prevailed. Arrival of the condition vested it in the legatee. If he accepted, this fact annulled any transfers or charges effected by the *heres*, though he remained entitled to the fruits accruing before the condition was satisfied. A very important restriction on this form of legacy was that only *quiritarian* property of the testator at death, and, for non-fungible things, at the time of testation, could be so left.

(b) *Legatum per damnationem*. The strict form for this was “*heres meus damnas esto rem Titio dare*,” the words “*damnas esto*” being probably connected with the drastic remedy, i.e., *manus iniectio* in early law, and action for double damages in classical law, at least where what was left was a *certum*. But these words were not necessary in classical law; “*dato*,” “*dare iubeo*” and other forms did as well. As its form shews, this mode created an obligation on the *heres*, a *ius in personam* in the legatee, but did not of itself transfer ownership. *Legatum per damnationem* is repeatedly spoken of as the most favourable form of legacy, the reason being that, although it gives only a *ius in personam*, indeed,

¹ P. 3. 6. 7.

precisely because it gives only this right, anything could be left by it, services, *res alienae*, future things, etc.

(c) *Legatum sinendi modo*. "*Heres meus damnas esto Titium sinere rem capere.*" This form gave only a *ius in personam*. It resembles *per damnationem*, but it does not seem to have had the same drastic remedy, perhaps because it may not have been recognised till *manus iniectio* had disappeared. Anything belonging to the testator or the *heres* at the time of the death could be so left but not, on the view which prevailed, what the *heres* acquired after the death. The *heres* need do no more than allow the legatee to take the thing left, though there was an opinion, rejected in practice, that the *heres*, here too, must make a formal conveyance.

(d) *Legatum per praeceptionem*. "*Titius rem praecipito.*" The scope and effects of this form of *legatum* were much disputed among the jurists. As its form shews, the legatee was to have the *res* before the division of the estate. The Sabinians held that it could be only to a *heres*, that anything in the *hereditas* could be so left, and that the remedy was that for division of the *hereditas*, *iudicium familiae erciscundae*. But Hadrian confirmed the view of the Proculians that it was a special form of *per vindicationem* and could be in favour of anyone. They held that if it was to the *heres* and was of quiritary property of the testator it could be vindicated; if only in *bonis*, *familiae erciscundae* was the remedy. If to an *extraneus*, it must be of quiritary property of testator, at his death, and could be vindicated. In later classical law, only what could be left *per vindicationem* could be left in this form.

These forms differed in their effects not only in the points already mentioned but in others, with some of which we shall later have to deal. It seems to have been not unusual to leave the property both *per vindicationem* and *per damnationem*, which was so interpreted as to give the legatee the right to the advantage of whichever rule was most advantageous to him in the actual case. But the importance of the forms was diminished by a *sc. Neronianum* (A.D. 64)¹ which provided that, if a legacy was left in a form not suited to it, it should be construed, to save its validity, as if it had been left in the most favourable form, i.e., *per damnationem*, by which anything could be left. There were some doubts as to the exact scope of this new rule, but it must be borne in mind that

¹ G. 2. 197; U. 24. 11a.

it did not suppress the forms. Where a *legatum* was in a form in which it was valid, all the rules of that form applied. In A.D. 339, it was enacted that no importance was to attach to the exact use of words¹, which seems to mean that where ambiguous forms were used the court would have to determine which form was meant. But it may signify that in practice the distinctions of form were beginning to be disregarded. In any case Justinian enacted that all *legata* were to be of one nature so that the remedies, to be considered later, would not in any way depend on the form of the gift².

77. Capacity. In general the rules were as in *institutio*, but some distinctions must be taken. The rule of the *l. Voconia*, excluding women in certain cases, had no application to *legata*. Municipalities were given the right to receive *legata* before that of being instituted. And there were relative incapacities which could not occur in *institutio*. Thus, a *legatum* to a man of what was already his was void. In this connexion the *regula Catoniana* must be considered³. This was a rule that a legacy which would have been "*inutile*" if the testator had died at the moment of testation, could not be validated by subsequent events. Doubts are expressed in the texts as to the exact scope and proper formulation of this rule. It did not apply to *institutiones*, though, as we have seen, they were governed by similar principles. The better view seems to be that the rule was of narrow scope, and applied only where the gift failed merely because of some relation between the legatee and the *res*, a relative incapacity such as that just considered, though there are indications of a somewhat wider application in later law. The rule did not apply to conditional *legata* or to those which "vested" only on *aditio* of the *heres*, such as *legata* of usufruct, or to cases coming under the *ll. Iunia* and *caducariae*, where the *ius capiendi* was lacking.

Legata to those in the *potestas* of the *heres* raised difficulty in this connexion. Such a gift is essentially one to the *heres* himself, and looks at least like a gift to him of what is his own already. But it is not exactly the same thing, for the individuality of the slave came into the matter. A legacy to a slave *post mortem domini* was valid, though a legacy to a man after his own death was void. A legacy to a slave was bad unless it was of a thing which might

¹ C. 6. 37. 21.

² In. 2. 20. 2.

³ D. 34. 7.

have belonged to him if he was free, e.g., a legacy of a right of way to him was bad, since the *praedium* to which it must attach would not be his if he was freed. These and other similar points raised the question whether a *legatum* to a slave of the *heres* could be good. Servius, in Cicero's time, held that it was good, but failed if, when it vested, he was still in the *potestas* of the *heres*. The *regula Catoniana* is ignored. The Proculians held the gift bad in any case. The Sabinians, applying the *regula Catoniana*, held that it was bad if simple, good if conditional, no doubt holding that it failed if at the time when the condition was satisfied, the slave was still in the *potestas* of the *heres*. Justinian adopted this view¹.

Joint Legacies. Lapse². A *legatum* might be joint in either of two ways:

"*Re et verbis coniuncti*" (*coniunctim*): "I give the thing to *X* and *Y*."

"*Re coniuncti*" (*disiunctim*): "I give the thing to *X*. I give the same thing to *Y*."

Where a thing was given in shares to two or more (*verbis tantum coniuncti*), this was not really a joint gift at all.

If a *legatum* to a single person failed, the *heres* benefited, except when excluded by the *leges caducariae*; but in joint gifts there were complications.

Where it was *per vindicationem*, or *per praeceptionem*, whether *coniunctim* or *disiunctim*, each had a right to all, subject to the right of the other—*concurso partes fiunt*. Thus, if one failed, the other benefited, not the *heres*. If a *res* were left to *A* and *B* *coniunctim* and to *C* *disiunctim*, failure of *C* benefited *A* and *B*; failure of either of these benefited the other. Only if all three failed did the *heres* benefit.

Where it was *per damnationem* or *sinendi modo*, *coniunctim*, each was entitled only to a share: a lapse went to the *heres*. If it was *disiunctim* and *per damnationem*, each was entitled to the whole or its value; there was not exactly a lapse of a joint gift, but one of two legacies failed, to the benefit of the *heres*. If it was *sinendi modo*, *disiunctim*, it is possible that if one had taken the *res* there was no further liability on the *heres*.

All this has no bearing on gifts which were *ab initio* void, e.g., a legacy to a peregrine. Such gifts were simply struck out *pro non scriptis*, at all times; the will being construed as if they were not there.

¹ G. 2. 244; In. 2. 20. 32.

² G. 2. 199, 205, 223.

The law as to lapsed gifts was profoundly modified by the *leges caducariae* already mentioned. Under their provisions, lapsed gifts passed under the old law of *ius accrescendi*, only in one case, i.e., where the person who would benefit was an ascendant or descendant (to three degrees) and had, therefore, the *ius antiquum*. Apart from this case, lapsed gifts of any kind went to *colegatees coniunctim*, with children; failing these, to *heredes* with children; failing these, to other legatees with children, and, failing any of these, to the Treasury, the *Aerarium*, for which the *Fiscus* was later substituted. Such windfalls need not be accepted, but, if they were, they carried their burdens with them. There was some modification under Caracalla, and again under Constantine. Under Justinian, the *leges caducariae* were gone and the old system was restored, with some modifications. A lapsed legacy went to the *heredes*, primarily to any *heres* on whom it had been specially charged, and it carried its burdens with it. All joint legatees shared: lapses went in the first instance to *colegatees*. If *coniunctim* the increment might be refused, but if accepted carried its burdens with it. If *disiunctim* it could not be refused but did not carry its burdens with it.

78. *Dies* and *Conditio* in *legata*. Though *dies* was not allowed in *institutio*, it was permitted in *legata*, where there were not the same objections to it. *Dies* may be either *certus*, postponement to a fixed future date or *incertus* (*certus an, incertus quando*). But in fact *dies incertus* in wills was treated as a condition; the most usual illustration being "*post mortem Titii*" (where Titius is a third person). But this rule did not apply, and the modality was treated as *dies*, where, though uncertain, it was bound to occur within the lifetime of the donee, e.g., "when the legatee dies," the moment of death being thought of as the last moment of life. A legacy payable after his death was invalid, though the practical effect would be the same. The logic is clear enough, but it is not surprising that Gaius regards the distinction as unreasonable. A legacy payable so many days before death was invalid, presumably as being *praepostere conceptum*, for such a date is impossible to fix. Justinian declared all these legal, as well as *legata ad diem*.

A conditional legacy is one made to depend on a future uncertain event. The exact meaning of the word *condicio* has already been considered.

Conditions are much more prominent in legacy than they are in *institutio* and it is probable that here they are much more ancient. Conditions on manumission are as old as the XII Tables and it may well be that the same is true for legacy. The rule restricting the imposition of conditions on the *institutio* of a son in *potestas* has no application in legacy, but, apart from this, the treatment of conditions is much the same in the two cases. Thus impossible, illegal or immoral conditions were struck out here as in *institutiones* and did not affect the gift. But, as the failure of a legacy could not affect the validity of the will, there is not the same reason here for the favourable rule, and it is clear that in earlier classical law some jurists thought that in this case they ought to be treated as in contract, and thus vitiate the gift. But the contrary view prevailed. The rules as to what amounted to fulfilment were as in *institutio*, though manumissions, which are not, in strictness, legacies, were still more favourably treated. Negative conditions, i.e., cases in which the gift was to take effect only if something did not happen, gave rise to difficulties, since this might in some cases remain open till the death of the legatee. Some relief was provided by the *cautio Muciana*¹, probably due to Q. M. Scaevola. The legatee, where the negative condition was in his power, and where, but for some relief, the question must remain open throughout his life so that he would never get the legacy, could obtain possession of the property, on giving security for its return if the condition was broken. In later law it seems, though the texts are in some conflict, that the *cautio* was applied to all negative conditions in the legatee's power. The *cautio* still existed under Justinian, indeed it was applied in a wider field, for it now covered *institutiones*. Its utility was, however, less: it was the impossibility of resolute conditions which caused resort to be had to negative conditions. But Justinian allowed resolute conditions on legacies with somewhat similar securities, so that negative conditions would be less used.

It should be added that classical law forbade *legata poenae causa*, i.e., legacies if the *heres* did or did not do a certain thing, operating as a penalty. Justinian, however, abolished this rule. The rules as to gifts *post mortem* and the like were as in *institutiones*.

Causa is not *condicio*, and thus a false reason assigned did not

¹ D. 35. 1. 7.

avoid the gift, though it is easy to see that difficult questions must have presented themselves on loosely written wills when it became necessary to determine whether a reason assigned was merely a reason or whether the testator had not in fact meant it for a condition. Together with this rule, "*falsa causa non nocet*," we find also the rule, "*falsa demonstratio non nocet*," an error in description does not vitiate the gift, if it is clear what is given and to whom.

Conditio must also be distinguished from *modus* (so-called). The latter is a direction as to the application of the gift. The most common case is erection of a monument or memorial, or disposal for charitable purposes. There is no condition, but the Praetor commonly requires security for carrying out the direction and there were other modes of enforcement, by administrative machinery into which we need not go.

79. *Dies cedit, dies venit*¹. These expressions are used to denote two critical points of time in the acquisition of a legacy. The opposition is only one of tense. *Dies cedit* means "the day is coming." *Dies venit* means "the day has come." *Dies cessit, cesserit* and the like mean that the point of time conveniently called *dies cedens* is past: it does not mean that, as yet, *dies venit*.

The effect of the arrival of the first date, *dies cedens*, was threefold. The gift became transmissible, so that if the legatee died his representatives could claim the gift, if, that is, it was of more than a life interest. If he died before *dies cedens*, the gift failed. Further, it determined the content of the gift. If, e.g., a flock of sheep were left, the legatee was entitled to it as it was on that day. If, of two things left, one was purely accessory to the other, e.g. a picture and its frame, and the principal thing had ceased to exist at *dies cedens*, the gift failed. Again, it might decide the destination of the gift. It failed if the legatee was dead or *incapax* at that date. A legacy to a slave went to his owner at that date. Borrowing a term from the English legal vocabulary, we may say that, at *dies cedens*, the legacy "vests." It must however be borne in mind that this is not identical with the vesting of the property in the legatee. This can occur at the earliest only on the entry of the *heres*, but we shall see that *dies cedens* is often earlier.

Dies venit means that the right has now fully accrued, and can

¹ U. 24. 30, 31; D. 36. 2.

be enforced by the appropriate remedies. If it has been repudiated, *dies* never *venit*.

Both days occurred without reference to the knowledge of the legatee. There was no fixed time within which to claim: indeed no claim was necessary: the right accrued automatically, though it might be divested by repudiation.

We have now to consider when these days occurred. If the legacy was simple (*purum*), even though it was subject to a direction, *dies cedit*, at the beginning of the Empire, at the death, but, after the *leges caducariae*, at the opening of the will, till Justinian restored the old rule. *Dies venit* at the entry of the *heres*. In *legata sub die*, *dies cedit* as in simple legacies, *dies venit* at the entry of the *heres* or the arrival of the *dies*, whichever was the later. In *legata sub condicione*, *dies cedit* on the occurrence of the condition; *dies venit* then or at the entry of the *heres* whichever was the later. In some legacies however there were special rules. Thus a legacy to a slave of the testator freed by the will ceded only at entry of the *heres*: it was only then that he became free so that any right could possibly vest in him. So too a legacy of usufruct vested only on the entry of the *heres*. The point is of less importance here, since there is no question of transmissibility, and the reason for the rule is obscure.

Excessive legacies¹. The XII Tables, in the words quoted at the beginning of this chapter, gave testators a complete power of legacy. The effect of this would be to enable a testator to evade the rule of *exheredatio* by instituting his *sui heredes* but leaving everything in legacies, so that the *heres institutus* had no more than the empty name of *heres*. Apart from this, excessive legacies might lead to refusal of the *hereditas* and resulting intestacy. An early *lex Furia testamentaria* restrained this by providing that anyone taking a legacy of more than 1000 asses was liable to a penalty of fourfold the legacy, enforced by *manus iniectio*. That it did not make the legacy void, but merely penalised it (*lex minus quam perfecta*) probably expresses the idea, of which traces survive to late in the Republic, that the XII Tables being a fundamental and unchangeable law, what they allowed could not be prohibited, and the matter could be dealt with only by this somewhat crude evasion. The provision was futile, for it imposed no limit on the

¹ G. 2. 224 sqq.; In. 2. 22.

aggregate of legacies within the limit. In 168 B.C. the *l. Voconia* forbade any legacy or *donatio mortis causa* to exceed what the *heredes* took. This also was ineffective, for practically the whole could be given away in small legacies, but it marks a certain progress, since it seems to make the legacy void. A more effective rule was provided by the *l. Falcidia* (40 B.C.) which enacted that if legacies exceeded three-fourths of the estate they could be cut down *pro rata*. The estate was to be valued as at the death, all debts, funeral expenses and the value of slaves freed by the will being deducted. The calculation was made separately for each *heres*, so that it might happen where legacies were separately and disproportionately charged on specific *heredes*, though some legacies were cut down, more than a quarter of the estate might remain with the *heredes*. Though the testator could not forbid the cutting down, he might provide that any particular legacy should or should not bear the loss. In later classical law, though perhaps not at first, *donationes mortis causa* were treated in the same way. The deduction was *ipso iure*, so that in a *legatum per vindicationem*, if there was a case for deduction, the legatee could vindicate only the proper fraction of the thing left to him.

Justinian allowed the testator to forbid the retention of a fourth, and, as we have seen, forbade it altogether if the *heres* did not make an inventory.

80. Failure of legacy. A *legatum* validly given may fail to operate from a variety of causes. Obvious cases are debts (for creditors must be paid first), death or loss of capacity before *dies cedit*, destruction of the *res* without fault of the *heres*, operation of the *l. Falcidia*, *ereptio* (forfeiture for *indignitas*) and repudiation by the legatee, which was irrevocable. Failure of the will would of course normally destroy such gifts, but there were provisions by which legacies were saved where a will was upset by collusion, or a testamentary *heres* refused in order to claim on intestacy, and some were saved in *bonorum possessio contra tabulas*. If an *institutio* failed, legacies specially charged on it failed in earlier law, but not after the *ll. caducariae*. More special cases are:

*Ademptio*¹. Revocation of the gift, which might be express, by declaration in the will or a codicil, or tacit, by the arising of hostility, by erasure, informal revocation, or by alienation unless

¹ In. 2. 21.

the circumstances shewed that there was no intent to adeem. *Ademptio* might be conditional or partial. The tacit ademptions were ambulatory, i.e., the informal *ademptio* might be informally cancelled, the gift revived if the hostility ceased, but mere repurchase did not revive the gift where alienation had been an ademption. There is however some obscurity about the effect of alienation, some of the texts having been altered. Tacit *ademptio* did not in classical law operate *ipso iure*: the *exceptio doli* was available, but under Justinian the effect seems to have been *ipso iure*.

Translatio. Substitution of one gift for another, either of another *res* or to another person. This destroyed the first gift even if the second failed, unless the second gift was conditional, in which case the first gift operated if the condition did not occur. It was essentially a case of *ademptio*.

Duae lucrativae causae. There was a maxim that "*duae lucrativae causae in eandem rem et eandem personam concurrere non possunt*." Thus, if after the will was made the legatee bought the *res*, he could still claim its value under the legacy, but if he had received it as a gift he could claim nothing. If it was left to him in two wills and he received only its value under the first, he could claim under the second, but not if he had received the thing itself under the first will. The rule is usually based on impossibility; the thing being already his, it is impossible for the *heres* to give it to him. This is of course equally true where he has paid for it, but the rule here, it is suggested, is an equitable relaxation.

Remedies of the legatee. In the earlier part of the Republic, when there were only the two forms, *per vindicationem* and *per damnationem*, the remedy for the first was, as we have seen, *vindicatio*, a real action, then tried by the process of *sacramentum*. In the other case the remedy, if the legacy was of a *certum*, was, apparently, *manus iniectio*; if it was not of a *certum* it was presumably an *actio in personam*, also then tried by *sacramentum*. So too, in classical law, the remedy was either an *actio in rem* or one *in personam*, the latter being applicable to *legata per damnationem* or *sinendi modo*. But here there was a difference. The action was called *actio ex testamento* and where the legacy was *per damnationem* and for a *certum* it was *duplex contra infitiantem*, i.e., for double damages against one who denied liability. This increased liability

did not exist in other cases: it is in fact, here as elsewhere, what is left of the old liability to *manus iniectio*.

Justinian provided¹ that all legacies were to be of one nature and to have the same remedies so far as these were applicable to the particular gift. Since each form of legacy had its own rules, the first of these unifications created difficulties as to which rule was to be applied. The difficulty was in part met, as we have seen, by legislation dealing with various points. Apart from this legislation, there was a general tendency to adopt the rule in *per vindicationem*, but there was a good deal of irregularity in the matter. The second of these unifications was accompanied by legislation completely recasting the system of remedies. Every legatee was to have his choice of three remedies, an *actio in rem*, an *actio in personam (ex testamento)* and an *actio hypothecaria*. This last was a new remedy altogether. The whole estate was regarded as pledged for each legacy, and an action could be brought against any *heres* on the pledge, but not beyond his share of liability for the legacy. This gave greater security. A further modification made by Justinian was that, on the one hand, he extended the double liability on denial to all legacies, a result of his unification, and, on the other, nearly destroyed it altogether, since he confined it to cases in which the legacy was to a church or a charity. There were of course cases in which no real action was possible, e.g., where what was left was a service to be rendered, or a *res aliena*.

There were other subsidiary protections to legatees. Thus, like creditors of the estate, they could claim *bonorum separatio*. And if the legacy was not payable, or was not paid, at once, the legatee could require security and if this was refused could get a decree of *missio in possessionem*, under which he could seize the estate and hold it till he was paid or security was given. Justinian², following a rule already applied in *fideicommissa*, allowed an unsatisfied legatee to seize, after six months, the property of the person liable and satisfy his claim out of the fruits. A little later he provided a machinery under which a year's delay, after a judicial order to pay, involved partial forfeiture of the rights of the *heres* under the will. These rather complex rules need not be stated in detail.

¹ C. 6. 43. 1; In. 2. 20. 2.

² D. 36. 4. 5. 16, 17.

81. Special kinds of legacy¹. Some legacies had peculiarities: a few of these cases must be stated:

L. rei alienae. This was quite valid if the testator knew the *res* was not his, on which point the burden of proof was on the legatee.

L. optionis. *L. generis*. The latter is a gift of a thing of a certain kind, but not of a specific thing. If there were such things in the *hereditas*, the legatee might choose; if there were not, the *heres* must procure one, at his choice. But the texts lay down the unpractical looking rule that the legatee must not choose the best, or the *heres* one of the worst quality. Where the choice was expressly given to the legatee, this was *legatum optionis*, and the legatee's choice was unrestricted. But, till Justinian, the choice was personal. If the legatee died without having chosen the legacy failed. Justinian allowed his successors to choose, if he survived *dies cedens*, and provided for lot if they could not agree.

L. ususfructus did not cede, as we have seen, till *aditio* of the *heres*. It had other special rules. We have already considered the case of a usufruct acquired through a legacy to a son or slave².

There was accrual between joint usufructuaries if one failed after enjoyment had begun, which would not be the case in, e.g., a joint legacy of ownership. And accrual was *personae*, *non portioni*, so that one who had lost his own share might yet take a lapsing share, a rule which leads to a number of subtle distinctions.

Praelegatum was a legacy to one of several *heredes*, the later form of *legatum per praeceptionem*. Its most important characteristic is that as the *res* would be in part his, as *heres*, the legacy fails in the proportion in which he is *heres*, as being a legacy of his own property.

L. partitionis. This is a legacy of an aliquot part of the *hereditas*, a share in the estate. The legatee (*legatarius partiarius*) could not sue or be sued by debtors or creditors of the estate: he was merely entitled to a certain proportion of the nett estate. But as he was entitled to his fraction of each thing, subject to its proportion of debts, it was usual to enter into agreements, that the *heres* should hand over the proper proportion of what came in, and the legatee would refund his proportion of what was paid to creditors (*stipulationes partis et pro parte*).

L. debiti. This is a legacy of the debt to the creditor. To be

¹ In. 2. 20. 4 sqq.

² *Ante*, § 61.

valid it must in some way increase his right, e.g., be simple where the debt is conditional, and where it was valid it superseded the debt. Thus a legacy of *dos* to the widow was good, though she was entitled to the *dos* in any case. But the *actio rei uxoriae* (*actio dotis* under Justinian) involved considerable delays while the legacy could be recovered at once. *Legatum nominis*, on the other hand, was a legacy of a debt due to the testator, and the legatee could require transfer of the rights of action. If it was to the debtor himself (*l. liberationis*) he could defend any action for the debt and could require a formal discharge from the *heres*.

L. rei obligatae. Legacy of a thing pledged. If the testator knew of the charge, the *heres* must deliver the thing free of the charge. If he did not know of it, in classical law, the charge fell on the legatee, but, under Justinian, if compelled to pay he could claim cession of the creditor's rights of action against the *heres*.

L. peculii. If the *peculium* was left to an *extraneus*, he was entitled to it as it was at the death: additions other than mere accretions did not go to him. If it was to the slave, with freedom, he took all additions up to the time when he was free. The fund is thought of as a sort of *universitas* in which the additions merge; and it is probable, though not clear on the texts, that if it was left *per vindicationem*, the fact that some elements in it may have been acquired after the will was made was not an objection: the fund was thought of as a whole. Apart from evidence of contrary intent the legacy covers what would be available to creditors of the *peculium*, i.e., not exactly the specific things, but these *plus* debts due to it from the master and *minus* debts due the other way.

A legacy of an annuity might be for a fixed number of years or for life, and even where no limit at all was expressed, the limitation to life was implied. It was not treated as one legacy but as a number of legacies, one for each year, all but the first being conditional on the legatee's being alive when the legacy fell due.

82. *Fideicommissa*¹. The strict rules of capacity to take under a will excluded many persons whom a testator might wish to benefit. Proscribed persons and exiles, who had necessarily lost their *civitas*, children by a wife who was a *peregrina* without *conubium*, all these were peregrines and thus were excluded, and women were to some extent excluded by the *l. Voconia*. A man might wish to

¹ G. 2. 246 sqq.; In. 2. 23, 24.

benefit the community in which he lived, or to give some thing to a person without being at the pains to make a new will. In these and similar circumstances it was a common practice to direct a beneficiary in the will to hand over property to some other person, sometimes by a request in the will itself, sometimes by a separate document (*codicillus*) and sometimes by word of mouth. But whatever the form chosen such gifts were not ordinarily enforceable in the Republic, except indeed that there is some evidence that where they were for a public object they were sometimes enforced by administrative machinery. In a few cases however, where there were special circumstances, glaring perfidy or "*per ipsius (Augusti) salutem rogatus quis diceretur*," Augustus ordered them to be carried out, by the Consuls, as administrative officers. But they soon became recognised as legal and enforceable, a special official, *praetor fideicommissarius*, being appointed to deal with them. The name of this official is not to be taken as shewing that *fideicommissa* were part of the *ius honorarium*: he is an imperial officer. The Edict has nothing to do with their introduction or their enforcement, though, as we shall see shortly, it did concern itself with some results of their recognition. They were civil law institutions, created in theory by the *interpretatio* of the jurists, in fact by the personal authority of Augustus.

The earliest *fideicommissa* enforced under this system were either in the will or in a codicil to an existing will, but, by the time of Gaius, *fideicommissa* could be imposed on a *heres ab intestato*. At first they were subject to few restrictions. They were, and continued to be, free from rules of form. But it was desire, not for relief from rules of form, which had induced their introduction, but for relief from vexatious restrictions on the substantive power of devise. In this field, limitations were soon imposed. The *ll. caducariae* were imposed on them by the *sc. Pegasianum* (A.D. 73). Peregrines, the very persons for the benefit of whom they seem first to have been used, were early excluded, and, under Hadrian, *fideicommissa* in favour of *postumi extranei* and *incertae personae* were forbidden. But Gaius enumerates many points in which they had the advantage over legacies. No particular forms or technical words were needed. They need not be in Latin. They could benefit a wider class, e.g., Junian Latins. They need not be in a will. They might be *post mortem heredis*. Things could be

done in this way which were impossible otherwise. Thus the *heres* could be directed to buy and free a slave. But they might not be made *poenae causa* in classical law, any more than legacies might. And no one could create a *fideicommissum* who had not *testamenti factio*.

Fideicommissa could be charged on others than the *heres*: anyone who received a benefit under the will might be subject to a *fideicommissum*, the person charged being called *fiduciarius*, the person benefiting being called *fideicommissarius*. Even a *fideicommissarius* might be subject to a further *fideicommissum*. It is easy to see that so long as they could be made in favour of *incertae personae* they might be utilised to tie up the property for ever. But when these were excluded, *fideicommissa* could be only in favour of persons at least conceived when the document creating the *fideicommissum* came into operation.

Fideicommissa might be of single things or of the *hereditas* or part of it. Those affecting the *hereditas* as a whole are much the most important. Under such a gift of the whole *hereditas*, it was usual, since the *heres* would still remain technically *heres* and, as such, liable and entitled as against creditors and debtors, to sell the *hereditas* to the *fideicommissarius* at a nominal price, and to make stipulations under which the *heres* was to hand over all assets and to allow the *fideicommissary* to bring all necessary actions against debtors to the estate. He was nominally representative of the *heres*; but really acted on his own account (*procurator in rem suam*). The *fideicommissary* was to refund anything the *heres* had to pay and take over the defence against all claims (*stipulationes emptae et venditae hereditatis*). If it was of part of the *hereditas*, the stipulations were as in *legatum partitionis* (*stipulationes partis et pro parte*).

Where the *heres* was to hand over the whole, it is plain that, as the *l. Falcidia* had no application, he would be inclined to refuse the *hereditas*, in order to avoid the trouble involved, which would destroy the *fideicommissum*. A partial remedy was found in the *sc. Trebellianum* (probably A.D. 56). This provided that handing over the *hereditas*, however informally, should pass the estate to the *fideicommissarius* and it directed the Praetor to give, to and against the *fideicommissarius*, the actions which lay, at civil law, to and against the *heres*. If the *heres* sued or was sued, which might still

happen, since he was still *heres*, there was an *exceptio restitutae hereditatis*. If only part was transferred, actions were to be given *pro rata*. But though the *heres* was thus relieved of trouble, there was no inducement to accept. No doubt he would frequently refuse, or demand payment for accepting. A better remedy was found within a few years. About A.D. 73, the *sc. Pegasianum* provided that the *heres* might in any case keep a quarter. If he still refused, the magistrate could compel him to enter, taking no profit and incurring no risk (*nullo nec damno nec commodo*). If less than three-quarters were given by way of *fideicommissum*, the Trebellian applied. If more, and he entered and deducted, the Trebellian did not apply, and the old *stipulationes partis et pro parte* were needed, an odd rule which seems to rest on the words of the *sc. Pegasianum*, which may have said that in such a case the fideicommissary was to take as in legacy.

The fact that the Trebellian *sc.* does not directly transfer the actions, at civil law, but directs the magistrate to transfer them, is a mere expression of the fact that at this time *sc.* had not reached the point of directly altering the civil law. The effect is that we have an intervention of edictal law. A clause was added to the Edict, promising to and against the fideicommissary, *actiones fictitiae* "as if he were *heres*." This has nothing to do with the relations between *fiduciarius* and *fideicommissarius*: these are dealt with by the administrative tribunal of the *praetor fideicommissarius*.

Justinian simplified the system¹. The *heres* could, as before, be compelled to enter, *nullo nec damno nec commodo*. Apart from this, if *fideicommissa* exceeded three-quarters, they could be cut down, and actions passed, either completely, where the *heres* did not exercise his right to deduct, or *pro rata* in other cases, with no need for stipulations. If *fideicommissa* exceeded three-quarters, but specific things were reserved to the *heres*, and these were worth a quarter, he took these and was treated as a legatee, all actions passing. If they were worth less they were made up and he retained actions and liabilities to the extent of this supplement. Before Justinian the Pegasian *sc.* would have applied and stipulations would have been needed. He further provided² that, as in the case of legacy, the testator could forbid the retention of a quarter. He calls his system a recast of the Trebellian *sc.*, though

¹ In. 2. 23. 7.

² Nov. 1. 2. 2.

he adopts the main principle of the *sc. Pegasianum*. His language shews that he was anxious to get rid of the traditions of the Pegasian *sc.*, no doubt on account of the irrational inferences to which its language had given rise.

83. *Fideicommissa* of single things were on a different footing. There was here no question of transfer of actions. The provision imposes an obligation on the *heres* much as a legacy *per damnationem* does, though it differs in its freedom from forms and restrictions, in the fact that it need not be in the will at all, and in the remedy, which was not the *actio ex testamento* but a proceeding before the *praetor fideicommissarius*. If charged on the *heres* and exceeding three-quarters it might be cut down, but there was no compulsion to enter on account of it. A *fideicommissum*, like a legacy, need not be of actual property. Almost anything might be done in this way. Services might be ordered. There might be a *fideicommissum* to buy a thing and give it to *X*, but it is not quite clear what happened if the owner refused to sell. Probably it failed in classical law. Freedom might be given to *servus alienus* by directing a beneficiary to buy and free him, or by leaving something to his owner with a direction to free him. In the former case, the gift failed if the owner refused to sell but Justinian provided that it was only postponed till purchase was possible. In the latter case, the owner accepting the gift was bound to free. (An analogous rule applied to all gifts accompanied by a *fideicommissum*, except that where they were of commensurable quantities, the *fideicommissum* was void as to any excess.) A legacy might be made to a man on condition of his freeing a certain slave. The result is somewhat similar, but this is not a *fideicommissum*. The legatee has no claim unless he has freed, but there is no duty on him to do so, and if he does, it is not thought of as a manumission under the will at all.

Justinian, completing his programme of assimilation, enacted that for the future there was to be no difference between *legata* and *fideicommissa* of single things: each kind of gift was to have all the advantages of the other. This is apparently intended to mean "advantages to the beneficiary," but it is not easy to interpret. The *regula Catoniana*, which is of no advantage to the beneficiary, applied, under Justinian, to *fideicommissa*, though there is no evidence that it did so before. In general, *fideicommissa* had the

advantage, but there were some points in which this was not so, and here the advantages of *legata* were extended to *fideicommissa*. Thus ownership passed, and the various remedies above stated all applied equally to both forms of gift, as did the rule of double damages *contra infitiantem*, so far as it survived at all.

Notwithstanding the assimilation, there were still distinctions to be noted. A gift of liberty is not a legacy, for liberty is not a *res*. As we have seen, liberty could be given to a *servus alienus* by *fideicommissum*, but not by direct gift, and in the case of a slave of the testator, the distinction still survived between a direct gift and a direction to the *heres* to free. The distinction was important. One freed by direct gift had no living patron (*libertus orcinus*). One freed by the *heres* under such a direction was his *libertus*, though his patronal rights were limited. And *legatum partitionis* survives under Justinian as a distinct thing from a *fideicommissum partis hereditatis*.

*Codicilli*¹. The term *codicillus* literally means a little document, but, as here technically used, it means an informal document dealing with disposal of the estate on death. The introduction of codicils is closely connected with that of *fideicommissa*. Augustus, having been instituted *heres*, subject to a *fideicommissum* in a codicil, ordered it to be carried out and consulted lawyers on the question whether codicils ought to be legally recognised. Opinion was favourable to them, and when Labeo was found to have made codicils, their legality was fully admitted. They might be made with or without a will, but it made a great difference whether the codicil was or was not confirmed, actually or by anticipation, by a will. If it was not, it could do nothing but create *fideicommissa*: if it was, it could do anything which a will could, except dispose of the *hereditas*. This however is not of great importance under Justinian when *legata* and *fideicommissa* are assimilated. An unconfirmed codicil could still not give liberty directly, and, probably, could not appoint a *tutor*, though such an appointment would usually be confirmed as of course. Anyone could make a codicil who could make a will, and, though *captivi* could not make wills, a codicil made in captivity was valid if the *captivus* returned with *postliminium*.

No form was needed till Constantine required witnesses as in

¹ In. 2. 25.

a will, if there was no will; and Theodosius applied this to all codicils. Justinian required five witnesses¹, but provided that if there were none, or too few, a claimant, having sworn to his good faith, could put the alleged fiduciary to his oath that he had no knowledge of such a disposition. If he would not take this oath he was bound.

A will which failed, as such, could not be treated as a codicil. There is, however, some evidence that if the testator expressed in the will a wish that if it failed as a will it should be good as a codicil (*clausula codicillaris*), classical law allowed this effect. Theodosius provided that if there was such a clause, the *institutus* might choose whether the instrument should be treated as a will or as a codicil.

84. We have now completed the survey of both the law of wills and the larger matter of the modes of voluntary transfer of property. It is convenient to treat by way of appendix two topics which involve a general view of each of these subjects.

Soldiers' Wills². The rules apply also to those of naval seamen. In early Rome military service was an ordinary part of the duties of a citizen. There was no standing army in the modern sense, but almost every male citizen might be called on to render some sort of military service. The army was simply the nation in arms. But the old system with its annual changes in personnel and command (for there was no severance between civil and military offices: the magistrates were the commanders), was not well suited to the needs of Rome as a conquering state, committed to long campaigns, and, by the time of Augustus the army had assumed a much more modern professional character. Inducements to join the ranks were held out and the law gave many privileges to *milites* as compared with civilians (*pagani*). Some of these we have already noticed. Peregrines, in the forces, often received grants of *civitas* on honourable discharge. For disciplinary reasons, a *miles* might not marry while on service, but on discharge he could contract civil marriage with any woman he chose, whether a *civis* or not; the point was that a peregrine who received *civitas* could still marry a woman of his own tribe without sacrificing the advantages of *iustae nuptiae*. They were often stationed for long periods at distant garrisons, and, notwithstanding the veto on

¹ C. 6. 36. 8. 3.

² G. 2. 109-111; In. 2. 11.

marriage, they did in fact contract unions with women of the place. *Milites* might plead error of law where most persons might plead only error of fact. *Milites* were exempt, or rather excluded, from *tutela*. But the most important of these special rules were in connexion with wills. We have seen that a *filiusfamilias miles* could make a will of his *peculium castrense*. But the soldier's privileges in testation, gradually organised by the lawyers on the basis of imperial rescripts of the first century, were far wider than this. There were practically no rules of form for the will of a *miles*. He could "test" though deaf and dumb. He could be partly testate, could institute a Latin, or a *coelebs*, or from or to a certain day; he could substitute without a will, could make pupillary *substitutio* to an *emancipatus* or even a *pubes*, could revoke a will informally, and was not bound by the rules of *testamenti factio*, *exheredatio*, *querela*, or by the *l. Falcidia* or *sc. Pegasianum*. *Capitis deminutio minima* (or *maxima* or *media* where it was a military punishment) did not affect his will. There were however some rules which applied to him. He could not make a will while he was a *captivus*. The *l. Aelia Sentia* and the *l. Fufia Caninia* applied to his will. An *institutio captatoria* was void.

The privilege lasted throughout the service, till Justinian limited it to the time during which the *miles* was actually with the standards. It confirmed wills made before the service began and a will made under the privilege remained valid for a year after discharge. All privilege then ended, but the fact that a condition on a gift in the will was not yet satisfied was immaterial.

The other topic to be considered is the question how far the law enabled a Roman to satisfy the desire, which has been felt in all ages by owners of property, so to "settle" his property as to secure that it should remain in the hands of his descendants. *Inter vivos* there was not much that could be done. It was impossible to impose a prohibition on alienation which should have any effect *in rem*. If the transferee alienated, the title of the alienee would be good though the act might be a breach of contract in classical law, though there is doubt for the time of Justinian¹. Successive usufructs could be created, but, as these must be to *certae personae*, only those conceived at the time of the gift could be so benefited. Much the same was true of wills. There was

¹ *Ante*, § 42.

the same restriction on usufructs. Even the *institutio* of *postumi* carried the matter no further, for all *postumi* instituted, either at civil or at praetorian law, must be conceived when the will operated. But when *fideicommissa* were introduced, since they could be made in favour of *incertae personae*, it was possible to direct the *heres* to transfer the property at his death to his descendants, to give these descendants similar directions, and so on, with the result that a perpetual succession was secured. In effect no one could have more than a life interest in the property. That this was possible and was actually done is clear, for there is such a provision in a surviving will of A.D. 108. But this possibility ended when Hadrian forbade *fideicommissa* in favour of *incertae personae*.

It then became common for the testator to forbid alienation and such prohibitions seem to have been for a time regarded as valid, so that the property was tied up at any rate for one generation, and, it may be, even further. But, at the beginning of the third century¹, such directions were declared void, unless accompanied by a *fideicommissum* in favour of some person or persons, who would usually be descendants of the testator. These were good only if the persons mentioned were alive at the testator's death or were the immediate descendants of persons so alive, so that the power was carried a generation further than under the old law, but was still far from a power to create a perpetual succession.

Under Justinian, gifts of all kinds to *incertae personae* were allowed, and this again opened the possibility of a real perpetuity. Here again, records shew that such perpetuities were actually created. As the result of a case brought before the Emperor for decision, Justinian enacted that such things should be good only for four generations². This became, somewhat modified, the basis of the medieval and modern Roman Law on the subject and operates to the present day in some communities which are still governed by Roman Law.

¹ D. 30. 114. 14.

² Nov. 159.

CHAPTER XI

THINGS. SUCCESSION ON INTESTACY. *BONORUM POSSESSIO*. OTHER CASES OF UNIVERSAL SUCCESSION

85. The defective state of our knowledge of the conditions of early Rome leaves room for diversity of opinion as to the extent of the power of *institutio heredis*, even under the XII Tables, and *a fortiori* for the earlier period. On one view there was an absolutely complete power, to which the law of *exhereditatio* set a limit in somewhat later days. On another view, one who had *sui heredes* had no such power of testation. On yet another view, not only had a *paterfamilias* with *sui* the power of testation, but this power had for its main purpose the choice of one or more of the *sui* to carry on the family *sacra*, to the exclusion of the others, who were disinherited and otherwise provided for; the will being only a specialised form of a still more ancient provision for the devolution of clan sovereignty. This idea has been used to explain many points in the law of wills as we find it in later times. Whatever view we may take on these debateable points, it is clear that in historical times the right of testation was general, and intestacy unusual and thought of as a grave misfortune. The cause of this dislike, which has been called horror, of intestacy, is not certainly known: among the many explanations offered perhaps the most probable is that testation gives control of the devolution of the *sacra* of the family. A *heres ab intestato*, other than a *suus heres*, could, before entry, transfer the *hereditas* to another person: a *scriptus heres* could not. In the result intestacy was comparatively rare, though of course there were cases in which it was inevitable and others in which it did in fact occur.

Most of the subsidiary rules of succession applied in intestacy as much as to wills, e.g., the rule *semel heres semper heres*, *beneficium abstinendi*, *spatium deliberandi*, *hereditas iacens*, the *sc. Pegasianum*, etc. But some did not. Thus the *leges caducariae* had no application. If one agnate refused the others had *ius accrescendi* whether married or not. The *l. Voconia* did not exclude women in intestacy, though an analogous rule appeared. *Collatio bonorum* applied, and appeared indeed in a new form in the later Empire.

Any descendant claiming, whether a *suus* or not, must bring in for division on intestacy, any *dos*, *donatio propter nuptias*, or provision to set him or her up in life, which had come from the father. Justinian applied this also to wills, somewhat irrationally.

It might happen that the succession was not immediate on the death. The person to take was the nearest relative at the time when the succession "opened," i.e., when it was certain that there would be no *heres* under a will. This might be long after the death owing to the *spatium deliberandi*, the possible existence of *substitutiones*, and of conditions which might not be determined for a long time, and the next of kin at that time might be quite different from the next of kin at the time of the death. *Postumi* could claim as under wills, but, in intestacy also, the time of death was so far material that no one could claim who was not conceived at the time of the death.

The rules of succession on intestacy¹ underwent great historical changes, nearly all of these tending to give greater effect to blood relationship than to the purely civil tie which alone was recognised by the early law. It is convenient to state the rules historically, dealing first with the ordinary case of an *ingenuus* deceased.

The XII Tables. The order of succession was:

1. *Sui heredes*, such persons as, having been in the *potestas* of the deceased, became *sui iuris* by his death, together with *postumi* who would have been *sui heredes* if born soon enough. Remoter issue through males were *sui heredes* if the intermediate link or links were dead or not in the *familia*, and they took between them the share their father would have taken. *Sui heredes* were *heredes* with no question of acceptance, though they had in later times the praetorian *beneficium abstinendi*. The right of *sui heredes* is not expressly stated in the XII Tables: it is assumed in the principal text: *si intestato moritur cui suus heres nec escit, agnatus proximus familiam habeto*².

2. *Proximus agnatus*. We have already considered what is an agnate: the nearest is arrived at by counting up to the common ancestor and down again. Though the word in the *lex* is singular, all those in the same, the nearest, degree took equally, *per capita*: there was no representation. If the nearest relatives were three nephews, one being the son of one brother, and two of another,

¹ G. 3. 1-38; In. 3. 1-6.

² U. 26. 1.

they took a third each. Agnates were not *necessarii*. They became *heredes* only by acceptance, which, in early law was by *cretio*, though in classical law informal acceptance sufficed. The words are not *heres esto*, but *familiam habeto*. This may mean that an agnate was not at first in strictness a *heres* and thus, possibly, not liable for debts or *sacra*. However this may be, he was certainly a true *heres* from the earliest historical times. The word *proximus* was strictly construed: only the nearest could take. If he refused there was no question of a claim by the next: there was no *successio graduum*. But, if he was the nearest, it was immaterial how remote he was. As we have seen, a woman could be an agnate, though agnation could not be traced through her. But, about the last century of the Republic, a rule appeared, as a piece of juristic construction, that a woman more remote than a sister (a *consanguinea*) could not succeed as an agnate. It is said to be based on the principles of the *l. Voconia*¹ (*Voconiana ratio*), but it was narrower, in that it allowed sisters to succeed, and wider in that it was not confined to the succession to one in the first class of the census.

3. *Gentiles*. If there were no *agnati*, the *gentiles* were to have the *familia*. The *gens* was a group, the members of which bore a common *nomen gentilicium*, and consisting in fact of a number of agnatic groups, all supposed to be related, i.e., descended from some mythical ancestor, together with dependents (*clientes*) attached to particular *patresfamilias* within the *gens*. The *gentiles* were probably not *heredes*: the property may have been thought of as returning to the common stock. But the institution was obsolete so early that we do not really know what happened, whether, e.g., they held in common or the property was divided. If the language of the XII Tables is to be strictly construed, as it presumably was, the *gentiles* took only where there were no agnates, not where agnates refused². If that is so then, under the XII Tables, there was no *successio ordinum*, as we have just seen that there was no *successio graduum*.

86. Praetorian reforms. The foregoing rules which excluded from the succession all emancipated children, all relatives not agnatically connected, and, from an uncertain date, all women agnates but sisters, harsh as they are, remained in operation till late in the

¹ P. 4. 8. 20.

² U. 26. 18.

Republic, when the Praetor intervened and established a more rational order. But *hereditas* is a civil conception—*praetor heredem facere non potest*. All he could do was to give *bonorum possessio*. The method of this we shall consider later in this chapter, but it may be said at once that in the field of intestacy, it seems to have been *cum re*, i.e., effective even against those entitled under the XII Tables, from some date in the Republic, at least in the cases which most directly concern us. The order established, so far as it concerns us here (other cases will be considered later), was as follows:

1. *Liberi*. These included *sui heredes* and all those descendants who, if omitted, could claim *b. p. contra tabulas*. One case required a special rule. Where an *emancipatus* had left children in the family these had become *sui heredes*. But it was unfair that their claims should be treated as independent of his, so that one line of descent should take two shares, and a new clause added to the Edict by Julian (*nova clausula Iuliani*¹) provided that the one share should be divided, the *emancipatus* taking half. As therefore his coming in did not affect the other *heredes*, he had in this case to make *collatio* only as against his own children.

2. *Legitimi*. This, as the name shews, covered only those with a statutory claim. As *sui* had already come in, the main case was that of agnates, but there were others, e.g., *parens* or *extraneus manumissor* (and where these occurred there could be no agnates), and certain cases under *scc.* of the Empire, which, in succession of and to mothers, created rights with priority to those of agnates (*scc. Tertullianum, Orfitianum*). There was a case in which near relatives were preferred to the person with a statutory claim, i.e., the *decem personae*, to the *extraneus manumissor*. Though this has a distinct name (*unde decem personae*) it is provided for in the Edict by a special clause in the Edict *unde legitimi*.

3. *Cognati*. The nearest relatives, of any kind, subject to the arbitrary limit that no one could claim who was beyond the sixth degree, except the child of a second cousin, who is in the seventh degree. The case covered those whose agnatic tie had been broken, even children given in adoption, relatives through females, and, in the case of deceased women, even illegitimate children. The nearest were entitled, taking *per capita*: there was no representation of deceased cognates by their children.

¹ D. 37. 8. 3.

4. *Vir et Uxor*. Failing other claims, the wife or husband took.

Under this system the *Gentiles* were ignored. As they are *legitimi*, this means that their claims were obsolete when these rules were framed. It will be observed that the Praetor gives free play to *successio ordinum* and *graduum*: if the *liberi* refused, the *legitimi* might claim and so on. If the nearest cognate refused, the next might claim (*successio graduum*) but that did not apply to agnates in the class of *legitimi*. This claim rested on civil law, and only the *proximus* had a right. It is to be noted also that a person might have two chances to claim. An agnate who had failed to claim as a *legitimus*, might still claim as a cognate, but he might not be the nearest cognate, or there might be others as near with whom he would have to share.

87. Imperial changes before Justinian. The rules of *anniculi* and *erroris causae probatio*, and, in later law, of legitimation, affected the law by adding persons to the class of *sui* and *liberi*, but the most important legislation directly altering the law is that affecting succession of or to women.

*Sc. Tertullianum*¹. A mother, not *in manu*, had no civil claim, and even at praetorian law, was only a cognate. This enactment, under Hadrian, gave a better right to mothers having the *ius liberorum*, i.e., having had three children (four if a *libertina*). It established an order as follows: (i) *sui* and other *liberi*; (ii) the father if not in another family; (iii) *brothers and sisters*; (iv) *mother and sisters*, the mother taking half, or all if there were no sisters. Thus, while brothers excluded the mother, sisters alone did not. The child might be illegitimate, and *capitis deminutio minima* of the mother was no bar. This looks like a completely new order of succession, and, so far as it goes, such it is. But it did not supersede the older law, and two principles which govern its application confine it to a very narrow scope. It applied only as between the persons mentioned in the rule: one not there mentioned, and entitled by the ordinary law before any person there mentioned, was not excluded: the *senatusconsult* did not apply. More important still was the rule that it was for the benefit of the mother: if, in the given case she would not benefit, the *senatusconsult* was not applied.

Difficulties in the application of the *senatusconsult* we shall not consider. There were some changes in the rules from time to

¹ In. 3. 3.

time: in particular, the requirement of *ius liberorum* was gradually modified out of existence.

*Sc. Orfitianum*¹ (A.D. 178). Children of a woman had no claim at civil law, and were cognates at praetorian law. This enactment gave them the first claim in succession to the mother, even if they were illegitimate, and even though they had suffered *capitis deminutio*. Where a woman died leaving a mother and children, the Tertullian would give the succession to the mother, the Orfitian to the children. The rule arrived at was that they shared, till an enactment of A.D. 426 preferred the children. The Orfitian gave no rights to remoter issue; but in A.D. 389², it was enacted that grandchildren of a man through a deceased daughter should take two-thirds of the share their mother would have taken, as against surviving *sui heredes*, and three-quarters of the estate as against agnates. And grandchildren of a woman, through a son or a daughter were to take on the same principles.

Anastasius³, about the beginning of the sixth century, enacted that emancipated brothers and sisters, by the same father, should take as agnates, subject to a certain deduction, which seems to have been of a third, if there were unemancipated persons of the same degree.

Changes under Justinian. The system of the *Corpus iuris* shews modifications, but little change of principle. In succession under the Tertullian the *ius liberorum* disappeared and the mother took a *pars virilis* with brothers. If the nearest agnate refused the next could now claim, and females more remote than sisters could now claim. The rules as to succession of remoter issue of or through a woman were extended to great-grandchildren, and the deduction in favour of agnates was removed. The Anastasian deduction was abolished and the right was extended to half-brothers and sisters by the mother, and to children of brothers and sisters, whole or half blood. A more significant change was the recognition of *servilis cognatio*. The children of a *libertus*, born while he was a slave, were not *liberi* for any purpose of intestacy, till Justinian made them *liberi* of the *libertus*, if and when they were free, with full rights of succession as between themselves, as between them and other *liberi* of the *libertus*, and as between them and their parents, but no further.

¹ In. 3. 4.

² C. Th. 5. 1. 4.

³ In. 3. 5. 1.

System of the Novels¹. The steady trend towards a more natural order of succession, which had been shewn throughout the Empire, culminated in the introduction, about ten years after the promulgation of the *Corpus Iuris*, of an entirely new system, in which there is hardly a trace of the old notions, agnation, *potestas* and so forth. It was an extremely modern looking system, and the rules have in fact largely influenced, through the adoption of them in the Canon Law, nearly all modern systems, including our own. The order was:

1. Descendants, without distinction of sex, remoter issue representing their parents.

2. Ascendants, the nearer excluding the more remote. Of several in the same degree, but in different lines, each group took half, irrespective of number. Brothers and sisters of the whole blood shared with ascendants, and where this occurred it seems that all took equal shares. There was a further peculiar rule that children of deceased brothers and sisters took their parent's share, but only if there survived some other brother or sister to keep the class alive. Otherwise, they were preferred to half-brothers and sisters. They would in most cases be the nearest of kin, but they would share with aunts and uncles in this case, and would take *per capita* and not *per stirpes*, as they would if they represented their parents.

3. Brothers and sisters of the whole blood with the same rule of representation.

4. Half-brothers and sisters with the same rule of representation.

5. The nearest of kin, *per capita*.

6. Husband and wife reciprocally. Not stated in the Novel, but otherwise shewn.

88. Succession to freedmen². The only case of real *hereditas* is that of *cives liberti*, and as, apart from Justinian's recognition of *servilis cognatio*, they had no relatives but children, the law of the XII Tables is simple. The order is: (i) *sui heredes*; (ii) patron; (iii) *liberi patroni*, their right being expressly stated in the Tables and in no sense inherited from the patron. Thus it was not affected by the failure of the *liberi*, from any cause, to succeed to the patron. No *heres* of the patron had, as such, any claim. A *liberta* could have no *sui heredes*. A *libertus* could make any will he pleased as against the patron, but as a *liberta* could not make

¹ Nov. 118, 127.

² G. 3. 39 sqq.; In. 3. 7.

a will without the patron's consent, he could always secure her succession if he wished.

Under the Praetor's scheme of *bonorum possessio*, the patron's position was improved. He was excluded by born *sui* and *emancipati* (not disinherited): as against *adoptivi*, wife *in manu*, or outside claimants under a will, he had a claim to a half, his remedy being, in this last case, *bonorum possessio contra tabulas*.

The *l. Papia Poppaea*¹ (A.D. 9) established a system, too elaborate for statement here, as part of the general scheme of that legislation to encourage marriage and stimulate the birth-rate. The rights of succession under the *lex* vary in a complex manner according to the number of children and the sex of the claimant and according to the wealth and sex of the deceased. It is a further remarkable feature of the statute that it gives in many cases not the *hereditas* but *bonorum possessio*, i.e., it adopts the terminology of the Praetor's Edict, sufficient evidence that by this time *bonorum possessio ab intestato* was *cum re*.

The order established by Justinian² was: (i) *liberi*, other than *adoptivi*; (ii) *patromus* or *patrona*; (iii) *liberi patroni*, other than *adoptivi*, but including those given in adoption; (iv) *cognati* of the patron to the fifth degree. As to testation, a *libertus* with less than 100 aurei could exclude the patron, but one with that amount or more must leave his patron, or, if he were dead his patron's *liberi*, at least a clear third, unless there were *liberi* of the *libertus* who either took under the will or could upset it.

Rights in the goods of a Junian Latin³. Here there was no question of succession. The Latin was said to become a slave at his death, so that his property reverted to his patron (or his *heredes*) as *peculium*. The children of a Latin had no claim, but it must be remembered that, in view of the rules of *anniculi probatio*, the Latin with children was probably not common. A *sc. Largianum* (A.D. 42) modified the system by providing that if the patron were dead, any issue of his not disinherited *nominatim* could take to the exclusion of *heredes extranei*, the effect being to give a right to those disinherited by the *ceteri* clause or who had refused the *hereditas* of their father. The change is rather small: its chief interest is that it makes the case look rather like succession to the Latin; and Gaius, while expressly repudiating the idea that it is

¹ G. 3. 42-53; In. 3. 7. 2.

² In. 3. 7. 3.

³ G. 55-73.

hereditas, states a rule which seems to be inspired by that notion. What was taken under the enactment was divided equally, not in proportion to the taker's share in the *hereditas* of the patron.

If a Latin became a *civis* by *anniculi probatio*, he was such for all purposes, including succession. We have already dealt with difficulties which arose where he became a *civis* under rules which left the patron's rights unaffected¹.

All these matters became obsolete when Justinian abolished Latinity: it is indeed probable that they had never played much part in the law of the Eastern Empire.

Rights in the goods of those *in numero dediticiorum*². The children of these could never have a claim. Apart from this, there is substantially but one rule. If the manumission would have made the man a *civis*, but for his misconduct, the rights of the patron and his children were the same as those in the goods of a *civis libertus*: if it would have made him a Latin, they were as in the case of a Latin, and it was reversion of *peculium*, not *hereditas*. The main result can be seen in the foregoing rules, but there are other results of the distinction between *hereditas* and reversion of *peculium*. If joint patrons took as *heredes*, they shared equally: if it was *peculium* reverting, they took in proportion to their shares in the man. If only one of the joint patrons survived, he took all, in *hereditas*; but the representatives of the other would have his share of a *peculium* reverting. If both were dead leaving children, these would take *per capita* in *hereditas*: each group would take its ascendant's share in *peculium*. As *hereditas* it would need acceptance and would create full liability for debts: as *peculium* it would be the patron's already, and there would be, in general, no liability for debts beyond the *peculium*. Gaius gives other illustrations. Some of these points would arise equally in connexion with *peculium castrense* and *quasi castrense* and *bona adventitia* of a *filiusfamilias*, but into some difficult questions arising here it has not seemed desirable to enter.

89. THE PRACTICAL WORKING OF *BONORUM POSSESSIO*³. This system, as we see it in the texts, was a set of rules under which the Praetor put into possession of the estate certain successors, whether *heredes* or not, in an order determined by the Edict, sometimes protecting them against claims by a *heres* (*bonorum possessio cum re*),

¹ *Ante*, § 21.

² G. 3. 74, 75.

³ G. 3. 25-38; In. 3. 9.

sometimes not so protecting them (*sine re*). Though there are many cases in which the person who gets a grant of *bonorum possessio* is the *heres*, still, it is, in the main, as we see it, a means of reforming the law of succession. But we must not think of it as having always had that character. Many historical explanations are offered of the beginnings of *bonorum possessio*, but the view most widely held is that *bonorum possessio*, which was primarily enforced by a possessory interdict (*quorum bonorum*), did not originally differ in character from other cases of praetorian protection of possession, also enforced by possessory interdicts. On this view, the original purpose of *bonorum possessio* was to give the advantages of possession to a person who seemed, *prima facie*, to be entitled. Thus the earliest application of the system would be *iuris civilis confirmandi gratia*¹. Even at that time it might operate to give effective rights to those not entitled at civil law. If, e.g., *bonorum possessio* was given under a will which was *prima facie* valid, but had not in fact satisfied all the forms, and there was no one entitled at civil law in the absence of a will, the *bonorum possessor* would be in the position that no one could effectively attack him. But this was not its design: it was only gradually that it assumed the character of an agency in law reform. Even when it did, it still served the purpose *confirmandi iuris civilis*, for the *bonorum possessor* would often be the *heres*. But far more significant are its applications *iuris civilis supplendi gratia*, e.g., where other *liberi* were allowed to share with *sui*, and *iuris civilis emendandi* (*corrigendi*, *impugnandi*) *gratia* where the civil law claim was excluded in favour of another, e.g., *gentiles* excluded to admit *cognati*, or *extraneus manumissor* to admit *decem personae*.

We have seen that at civil law there was usually one person or group of persons entitled and that there was no rule limiting the time within which a claim must be made (though delay might be disastrous, by reason of *usucapio pro herede*), till the Praetor began to fix a *spatium deliberandi*. The passing of this time excludes the claimant, in effect. Under a will it may let in a substitute, or increase the shares of the other *heredes* or bring the *leges caducariae* into operation. But, apart from this, and generally in intestacy, where, as we have seen, there was no *successio ordinum* till very late, it had not the effect of opening the way to a new set of claims.

¹ In. 3. 9. pr. 1; G. 3. 41.

But in granting *bonorum possessio* the Praetor acts on different lines. The Edict sets out all possible claims for *bonorum possessio* in a certain order (not all of them will occur in any one case), and allows a certain number of days within which the claim of any class must be made. Normally it is 100 *dies utiles* (i.e., days on which it was both lawful and *de facto* possible for the claim to be made), but descendants and ascendants have a year. As it might be possible for one member of a class to claim when it was not for another, e.g., one might be absent and another not, or one might be unaware of his right, the times for all members of the class would not expire together. If one member is barred by time, the share of those of the class who have claimed is enlarged. If a whole class have failed to claim, time begins to run for the next class, and so on. This looks as if a long time must elapse before a remote claim like that of *vir et uxor* could come in, but it might be considerably shortened. Thus the time for a class which did not exist in the given case was not counted. If a class, as a whole, repudiated, it was excluded and time began for the next. And those who had a year could be formally asked if they repudiated. If they assented, the next class was admissible. In view of the principle of the civil law, this succession of claims was not a matter of course: it was expressly provided for by a provision of the Edict, the *edictum successorium*¹. We must further remember in applying the rules that a man may have more than one claim. Thus an agnate who has failed to apply as a *legitimus* may still be the nearest cognate.

The application was made to the magistrate and it might be done quite informally and out of court (*de plano*). It was granted practically as a matter of course, with little or no investigation into the facts alleged by the claimant. This looks surprising, as the grant seems to be an important step. But in fact, little turns on it. It is a necessary preliminary to any further proceedings, just as the issuing of a writ is to an action at law, but that is its whole significance. When further steps were taken, they would normally be by interdict *quorum bonorum*, to recover property from someone. But that interdict is expressed in such terms that it orders possession to be given to the plaintiff, not merely on the ground of his having a grant of *bonorum possessio*, but on the ground of his having a

¹ D. 38. 9.

grant *ex edicto*, i.e., in accordance with the provisions of the Edict. Thus if one who had obtained a grant when his claim was not yet admissible, on account of prior claims, or after his time was up, or without any right at all, these facts when proved would be a complete reply to his interdict. Such a *bonorum possessio* was only nominal: it was of no use for any real purpose. It must not be thought of as a *bonorum possessio sine re*: that was a *bonorum possessio* effective for its immediate purpose, the getting of actual possession of the property, but liable to be defeated in the long run by a claim of the *heres*. The kind of grant we are considering is a mere nullity. It in no way bars the validity of a grant to someone else, but a valid grant, *cum* or *sine re*, prevents a valid grant to anyone but a member of the same class.

90. The order of claims established by the Edict is:

(a) *B. p. contra tabulas*, the first question, naturally, being whether there is a will, and, if so, whether there is anyone entitled to dispute it.

(b) *B. p. secundum tabulas*. Failing claim under this head;

(c) *B. p. ab intestato*, of which there are of course many grades:

(i) *Unde liberi*, the word *unde* meaning "that part of the Edict which brings in" *liberi*.

(ii) *Unde legitimi*, including, besides agnates, the patron, *liberi patroni*, *parens* and *extraneus manumissor*, and cases under the Tertullian and Orfitian *senatusconsults*. There is an appended clause to this, "*unde decem personae*," by which the Praetor admits, in preference to the *extraneus manumissor*, descendants, ascendants and brothers and sisters, whole or half blood.

(iii) *Unde cognati*.

(iv) *Unde familia patroni* (or *tum quem ex familia*) the exact field of which is much disputed.

(v) *Unde patronus, patrona, liberi et parentes eorum*, an obscure case supposed to refer to the patron of the patron, the deceased being a *libertus*.

(vi) *Unde vir et uxor*.

(vii) *Unde cognati manumissoris*.

There was another class, *uti ex legibus*, for the cases in which a *lex* or other enactment gave *bonorum possessio* (e.g., *l. Papia Poppaea*), which is stated independently.

Under Justinian the order was simplified. *Unde decem personae*

was obsolete and (iv), (v), and (vi) were placed under *unde cognati*, so that on intestacy there were only *unde liberi, legitimi, cognati* and *vir et uxor*, with *uti ex legibus*.

We have now to consider the remedies available to and against the *bonorum possessor*, assuming his grant valid.

I. The interdict *quorum bonorum*¹. By this he could recover any property of the estate, not indeed from anyone who held it, but from anyone who held it *pro herede* or *pro possessore*, i.e., who claimed to hold it as *heres* or alleged no title at all. Against these he could recover not only what they possessed but what they had fraudulently ceased to possess (or its value) and even what they had usucapted *pro herede*. Against persons claiming to hold under some different title this remedy was not available. Assuming validity of the grant, it was immaterial whether it was *cum re* or *sine re*, a distinction which would not be apparent on the face of the grant. It follows that a true *heres*, who might in the long run be able to recover the property from the *bonorum possessor* by a civil remedy, would nevertheless have to surrender it in the meantime under this interdict. But, as we have said, the interdict orders the possession to be given up only to a *bonorum possessor ex edicto*: it must be a grant in due accord with the terms of the Edict.

II. *Hereditatis petitio possessoria*². This was a praetorian extension of the *hereditatis petitio* of the *heres*. It covered much the same ground as the interdict and was available against much the same persons. But it was more effective, as it was not merely provisional, but final: after recovery in this action the defendant was barred from any further claim. It follows that if it was brought against the true *heres*, as it might be, it would be effective only if the *bonorum possessio* was *cum re*. If it was *sine re* the *heres* had an *exceptio*, probably *doli*. As the action covered the same ground as the interdict, called for the same proof and was more effective, it is not at first sight clear why a *bonorum possessor cum re* ever preferred the interdict. One explanation offered by recent writers is that this action is not really classical but was only introduced in the Byzantine age. This is however not generally accepted, and there are other explanations. If one was uncertain whether, on the facts, the *bonorum possessio* was *cum* or *sine re* or whether the defendant was or was not the *heres*, he would bring the interdict, in which

¹ G. 3. 34; *post*, § 174.

² D. 5. 5.

these points were immaterial. And, till Hadrian, *hereditatis petitio* was not available against one who had fraudulently ceased to possess, but the interdict was. And, as we shall see in dealing with procedure¹, this interdict, like the prohibitory interdicts, involved certain *sponsiones* of money which gave a profit to the winner. And, even in later law, the procedure was speedier, since there were more restrictions on appeals.

III. He could sue holders of property of the *hereditas*, who claimed otherwise than *pro herede* or *pro possessore*, by *actiones fictitiae* "as if he were *heres*." It was immaterial whether he was *cum re* or *sine re*, though in the latter case he would probably, in the long run, have to hand over to the *heres* what he had recovered.

IV. He could sue debtors and be sued by creditors by actions with a similar fiction, but here too, though it was immaterial in the action whether the *bonorum possessio* was *cum* or *sine re* (provided it was *ex edicto*), he would have, in the latter case, to account to the *heres*.

V. When he had obtained possession of property under any of these proceedings, he was not thereby *dominus* of it. But "*qui iussu praetoris possidet, iuste possidet*" and he could usucapt. If his *bonorum possessio* was *cum re*, this would proceed as matter of course. He might usucapt even if it was *sine re*, if the *heres* took no steps, but in this case the *usucapio* was always liable to be interrupted by his intervention. In *sine re* cases there was no reply to action by the *heres*: in *cum re* cases there was no civil law reply, but there was an *exceptio doli*.

VI. When the *heres* ejected him, he would have to account for all debts which had been paid to him and could claim in respect of those he had paid.

91. We have dealt with the distinction between *bonorum possessio cum re* and that *sine re* and with its effects. We have now to consider what cases came under each of these heads.

Bonorum possessio contra tabulas seems to have been *cum re* in all cases in classical law and there is evidence that it was so by the time of Augustus.

Bonorum possessio secundum tabulas would always be *cum re* if the will was valid *iure civili* or no one was entitled at civil law, or the *bonorum possessor* was *heres*. But there were many kinds of defect

¹ *Post*, § 175.

in the will, against which praetorian relief was given, and here *bonorum possessio* did not become *cum re* in all cases at the same time. Under a purely praetorian will in favour of others than *heredes*, the *bonorum possessio* was always *sine re* as against *sui*. Hadrian made it *cum re* where the only defect was omission of a *postumus* who died before the testator¹. As against near agnates it was made *cum re* by Antoninus Pius² and it may have already been *cum re* against remoter agnates. Where a woman made a will without her tutor's consent, he made the *bonorum possessio cum re* if the tutor was *fiduciarius*³, but where he was *legitimus* it was *sine re* so long as *perpetua tutela* of women lasted.

Unde liberi, *legitimi*, *cognati*, *vir et uxor*, were normally *cum re* from the earliest times. But if these claims came in only because one entitled under an earlier head, who had also a civil law claim, had not troubled to get a grant, but relied on his civil law claim, the *bonorum possessio* actually granted would be *sine re*. The same, on both points, may be said of the various *bonorum possessiones* applying to the estate of a *libertus*. Apparently *bonorum possessio unde decem personae* was ordinarily *cum re*.

It will be observed that in all the cases in which the date at which the *bonorum possessio* became *cum re* is known, it was made so not by the Praetor, but by the Emperor. Most of these however date from a time after Julian's crystallisation of the Edict. How those became *cum re* which were so from early times cannot be said: it may have been by the Praetor's authority alone or by legislation of which all trace is lost.

92. Under Justinian, all *bonorum possessio* was normally *cum re*. In fact, *hereditas* and *bonorum possessio* were practically fused, and the machineries were different ways of arriving at the same result. The Digest expresses this by saying that *bonorum possessio* is a means of obtaining and keeping the property (*persequendi et retinendi*). But the case must still have occurred, under him, of a grant made in accordance with the terms of the Edict, but, in fact, to a person not entitled, e.g., *sui* relying on their civil claim, omit to claim *unde liberi*, and at the proper time, agnates claim *unde legitimi*. Exactly how such a case was treated is not quite clear, but it is probable that this was not then thought of as a valid *bonorum possessio* at all.

¹ D. 28, 3, 12, pr.

² G. 2, 120.

³ G. 2, 122.

We have seen that under Justinian, nearly everyone entitled to *bonorum possessio* was also *heres*, so that it mattered little in which way he claimed. It seems from the Digest that the usual course was to claim as *heres*. The times available were not the same, but a claimant too late for one could fall back on the other. But there are a few cases in which Justinian leaves the claimants confined to *bonorum possessio*. Thus *emancipati* or *emancipatae* attacking a will must proceed by *bonorum possessio contra tabulas*, probably on account of the rules of *collatio*. *Unde cognati* and *unde vir et uxor* remain purely edictal under the system of the *Corpus Iuris*.

The student may be puzzled by the conception of *bonorum possessio sine re*, and be inclined to ask why one troubled to obtain *bonorum possessio* only to be turned out by the *heres*. It must be remembered that almost any *bonorum possessio* might in appropriate circumstances turn out to be *cum re*. The *heres* may make no claim, for family or other reasons, or he may come to terms. In such cases it would be, *de facto*, *cum re*; and the question whether it is *cum* or *sine re* in law may be determined by circumstances of which the claimant may have no knowledge. It may not be certain whether the person against whom he is claiming is really the *heres*. And a claimant who knows that he is liable to be ousted by the *heres* will not be blind to the advantages of possession, which gives him the favourable position of defendant, so that the burden of proof is on the other party. A perfectly good case may often be difficult to prove. Human nature being what it is, this might often lead to a claim. So too the question may be asked why the Praetor gave *bonorum possessio* in cases in which he did not intend to protect the grantee against the *heres*. But the Praetor cannot know whether the case is one *cum re* or *sine re*: he has never heard of the parties before. He is ignorant of the circumstances and there is no real enquiry into them before him. To settle the point would be to try the whole question and this is the affair of the *iudex*, *in iudicio*, not of the Praetor, *de plano*, or *in iure*. As in all other cases under the formulary system, the actual hearing of the case is before another person: the Praetor merely settles the issue. And the fact that it is merely *sine re* is no proof that the Praetor wished it to be: it may well be the first step in a process of law reform.

The *bonorum possessio* which we have discussed is *bonorum possessio edictalis*, the routine machinery of praetorian succession.

It is to be distinguished from *bonorum possessio decretalis*¹. In certain cases, where the person entitled was incapable of claiming *bonorum possessio* in the ordinary way, a special machinery was provided. This *bonorum possessio decretalis* might be applied for on behalf of a lunatic by his *curator*, an expectant mother might apply for it for her unborn child; it might be given to a child whose legitimacy was disputed, and it is probable that in classical law it could be given to a *pater* or *tutor* on behalf of an *infans*. But it was not a matter of course: it needed a *decretum* and thus could not be given, as ordinary *bonorum possessio* could, anywhere, *de plano*, but only in court, *pro tribunali*. Its effects were not the same, for it was provisional in another sense, since it failed if the lunatic died without becoming sane and claiming, if the child was never born, when the question of legitimacy was settled, and if the *infans* died *infans*. Even in the meantime its effects were different. They were not quite the same in all cases, but its purpose was merely the interim protection and administration of the estate. It ceased when its purpose had been served.

93. SUCCESSION OTHERWISE THAN ON DEATH. In all systems of law, cases occur in which a man's assets pass from him otherwise than on death: bankruptcy is an obvious illustration. In Roman Law the cases were more numerous than they are in modern systems, their number being due to some extent to the prominence of *capitis deminutio*. The following list is not exhaustive: nothing is said about the *deportatus* or the condemned criminal, whose goods are forfeited to the State (*publicatio*) pending sale in detail.

A. *Adrogatio*². Here the general principle was that all the rights, whether property or family rights, of the *adrogatus* passed to the *adrogator*, so far as they were not destroyed by the *adrogatio*. The liabilities on the other hand did not pass except so far as they were inherited obligations, in which case they bound the *adrogator* as fully as they had bound the *adrogatus*. Obligations *ex delicto*, not being extinguished by *capitis deminutio*, continued to bind the *adrogatus*, and thus bound the *adrogator* noxally. But obligations *ex contractu* and the like were destroyed by the *capitis deminutio*. The general notion underlying this is that the *adrogatus* was treated as having always been in the *potestas* of the *adrogator*, in which case his acquisitions would have gone to the *paterfamilias*,

¹ D. 38. 9. 1. 7; 38. 17. 2. 11.

² G. 3. 83, 84; In. 3. 10.

but obligations incurred by the *filiusfamilias* would not bind the *paterfamilias* at civil law. But where a *filiusfamilias* became *heres*, the *hereditas* with its obligations vested in the *paterfamilias*, so that inherited obligations bound the *adrogator*.

The result was plainly unfair. It is likely that in early law the matter was seen to by the Pontiffs. In any case the Praetor found a remedy. The *actio de peculio* would not serve: the *adrogator* might not have given him a *peculium*, and even if he had, it need not have borne any relation to his assets and liabilities. But in fact it was not applicable. The Edict expressly confines this action to cases where the contract was made with one *in potestate*, and, though there are signs of a contrary opinion, the view which prevailed was that the fiction was not to be so applied as to override the express words of the Edict. Accordingly, the Praetor provided a special action. The creditor might proceed against the *adrogatus* as if there had been no *capitis deminutio*, and unless the action was defended, which (since the defence would be by the *paterfamilias* or a representative) would involve giving security for the amount, the creditor might seize the property brought in by the *adrogatus* and sell it to satisfy his claim.

We have already noted the changes made by Justinian, in the rights of the *adrogator*, but this system remained in force.

B. Passing into *manus*¹. The rules are substantially the same, but, at any rate in classical and later law, there could be no question of noxal surrender.

C. *Cessio in iure hereditatis*². A *legitimus heres*, before entry, could by *cessio in iure* transfer the *hereditas* to another person who, on acceptance, became *heres* for all purposes. A *scriptus heres* had no such right, nor had a *suus*, who was *heres* without acceptance. If a *legitimus* attempted to do it after entry, he did not transfer the *hereditas* (*semel heres semper heres*), but assets passed and debtors were released, while the *heres* remained liable for the debts. The same applied to a *scriptus* after entry, but *cessio* by him before entry was a nullity. *Cessio* by a *suus* must necessarily be after he was *heres*: the Sabinians held it a nullity, the Proculians, more logically, applied the same rule as in the case of *legitimus* ceding after entry. But the Sabinian view seems to have prevailed. The whole institution was obsolete under Justinian.

¹ G. 3. 83, 84.

² G. 2. 34-37; 3. 85-87.

The rules give rise to many questions. It is not clear why *scriptus* and *legitimus* were differently treated. It is not clear why debtors were released, but into these questions we shall not go. That assets should pass is rational, since there was a definite *cessio in iure* of them, and neither claims nor debts could be assigned in this way.

94. D. *Adsignatio liberti*¹. By a senatusconsult of about A.D. 45, a patron was allowed to assign the succession of a living *libertus* to any of his issue in *potestas*, by will or otherwise, the assignment failing if the assignee passed out of *potestas* or predeceased the assignor without issue. The assignment might be conditional or *ex die*, and it was revocable.

The enactment was necessary to confer the power, since what was assigned did not belong to the patron (*nemo est heres viventis*): it was an as yet non-existent *hereditas* of a third person, in which he would have no right unless he survived the *libertus*, for, if he did not, the right of *liberi* came in, and this was a direct independent creation of the XII Tables, not in any way an inheritance from the patron, controllable by him. Hence he was allowed to assign to none but those entitled by the XII Tables: in effect, what he could do was to exclude one or more of those so entitled, but nothing more. It was not his own and thus he could impose no charge on the beneficiary, even if it was by his will—there could be no *fideicommissum*. It is remarkable that the rule is not mentioned by Gaius, or, as it seems, in any surviving classical text.

E. *Addictio bonorum libertatis conservandae causa*². By an enactment of Marcus Aurelius, the rules laid down by which were modified from time to time, it was provided that if liberties had been given in a will or codicil, and as no *heres* accepted the creditors were about to seize and sell the estate, so that the gifts would fail, the estate might be assigned to one of the freed slaves, or (perhaps only later) an outsider, who gave full security to the creditors³. It was a transfer of the *hereditas* by an act *inter vivos*. The effect was that the will operated, the ownership in the property passed fully to the assignee, since it was a civil transaction. Direct gifts of liberty took effect and the addictee had to carry out fideicommissary gifts. But debts were not assignable: and as to debts

¹ In. 3. 8.

² In. 3. 11.

³ *Ante*, § 18.

due to the estate he was in the same position as a *bonorum possessor*, having *actiones fictitiae* "as if he were *heres*." Creditors could sue him by similar actions, though it is possible that at first he was liable only to the person to whom he had given security, he, in turn, being liable to the creditors.

F. *Sc. Claudianum*¹. A woman who cohabited with a slave against the express prohibition of his master, might, under this enactment be enslaved. We are not told what became of her property. As she became the property of the master it is generally held that her property also went to him, on which view he would no doubt be liable and entitled in the matter of debts, by *utiles actiones*. There is no evidence that it went to the State, as did the property of persons condemned to penal slavery. She was not a *serva poenae*. The institution is called *successio miserabilis*, which suggests that the property may have passed to her relatives, but there is no other evidence for this. It is a transfer of an estate *inter vivos* by the effect of a judgment. The whole institution was abolished by Justinian, some of the other but connected provisions of the enactment having been repealed long before.

G. *Bonorum Venditio*². This was a purely praetorian institution, a machinery under which the goods of a citizen might, in a variety of circumstances, be seized and sold under the authority of the Praetor. It had many applications. It was for instance the way in which a defendant in litigation was compelled to take the steps necessary for the furtherance of the proceedings. But its most important application is in the case of insolvency of a person living or deceased, and, particularly, in case of failure to satisfy a judgment. It is in that connexion that it can best be studied in detail: here we have only to consider its character as a transfer of a *universitas rerum*. The property having been seized as a whole, the creditors appointed a *magister bonorum* to sell it as a whole, and they were normally sold at auction to the highest bidder. The bids were not of a sum of money, but of a dividend on the debts: the estate was knocked down to the bidder of the highest dividend. He was the *bonorum emptor*. His title being purely praetorian, he had the property only *in bonis*, but *usucapio* would make him *dominus*. He could sue debtors to the estate by an action with the Rutilian *formula*, i.e., one in which the debt was claimed

¹ G. 1. 84-86; In. 3. 12.

² G. 3. 77-81; In. 3. 12; *post*, § 159.

as due to the bankrupt, but the *iudex* was directed, if the debt was proved, to order payment to the *bonorum emptor*. Where the bankrupt was dead, this would be inapplicable, for nothing can be due to a dead man: in that case another formula was used, the *actio Serviana*, in which the debt was claimed as due to the *bonorum emptor* "as if he were *heres*." Conversely the *bonorum emptor* could be sued by creditors, not for the whole debt, but for the proportion of it corresponding to the dividend he had bid. The formulae were probably of the same types, with a *taxatio* to the right proportion.

It will be observed that all this is purely praetorian, and is thus on a different footing from the other cases. But, in fact, it is not universal succession at all, in the sense of a transfer of the legal position of the debtor. He suffers no *capitis deminutio*. The *dominium* remains in him at any rate till *usucapio* is complete. He is not freed from his old debts but can still be sued for the unpaid balance, subject to restrictions which do not affect the principle, if he afterwards acquires property. Creditors who had not put in claims do not seem to have been affected by the bankruptcy, except indeed that they have no share in the sold assets. What has happened is a praetorian transfer of a mass of assets, and the fact that Gaius includes this case in his series of transfers *per universitatem* is strong evidence that, for him, this means transfer merely of a mass of *res*, a *universitas rerum*, as a whole, and not a transfer of a man's legal position, his *universitas iuris*, which is the way in which Justinian understands the notion. The institution disappeared in the third century, with the formulary system.

CHAPTER XII

THINGS. OBLIGATIONS. FORMAL CONTRACTS

95. We now pass to the second branch of the *Ius Rerum*, the creation, content and determination of those relations which involve what are called *Iura in Personam*, rights available against a specific person or specific persons. To these relations it is usual and perhaps convenient to give the name *Obligatio*, but this is not altogether a simple term, and a little space may well be devoted to consideration of its meaning.

While every *obligatio* is a *ius in personam*, it does not follow that every *ius in personam* is an *obligatio*. When we look at the topics treated by Gaius under this head, it becomes clear that, at least in his time, that was not so. He tells us¹ that every *obligatio* arises either *ex contractu* or *ex delicto*. He is unquestionably using *contractus* in a wide sense here, for he gives, as an instance, the obligation to repay money paid in error, though he notes that this is not properly speaking a contract. He seems inclined to include in the term anything which can be called a *negotium*, subject to one most important limitation. All the *obligationes* which he discusses are civil (i.e., not praetorian): for him, in the *Institutiones*, *obligatio* is a purely civil conception, as also are the notions *contractus* and *delictum* or *maleficium*. It is not absolutely certain that this was the current view when his book was written, for there are many signs that it was modelled on an earlier work, and, though his actual statements of law may no doubt for the most part be taken as correct for his own time, his general reflections and classifications may well be those of an earlier age. At any rate, in another work of his, as cited in the Digest, he includes certain praetorian rights, and uses the word contract to mean agreement actionable at civil law. It is indeed sometimes said that these changes are post-classical, and appear in the Digest texts only by interpolation. However this may be, in Justinian's time there is no doubt about the inclusion of praetorian *iura in personam*, for he states², as his *summa divisio* of obligations, that into civil and *honorariae*, though in fact he makes no use of this *summa divisio*,

¹ G. 3. 88.

² In. 3. 13.

but adopts and works from an amplification of that of Gaius. For Justinian *obligationes* are classed under four heads, *ex contractu*, *quasi ex contractu*, *ex delicto* and *quasi ex delicto*. The nature of these distinctions we shall consider later: here it is enough to say that, while the fourth class deals with cases which are all praetorian, all the cases given under the second head are civil, though some are of praetorian origin. There were a number of analogous cases which might have been included; there were in fact a large number of praetorian rights and liabilities which are never called *obligationes*, though it seems that, under Justinian, they might well have been included.

Gaius gives no definition of *obligatio*: indeed, though he is always ready to classify, he rarely gives a definition. In the Institutes of Justinian, however, we have a famous definition. "*Obligatio*," he says¹, "*est iuris vinculum quo necessitate adstringimur alicuius solvendae rei secundum iura nostrae civitatis*." It is to be noticed that this definition starts from the idea of duty, while the general treatment of the subject is, as might be expected, from the other point of view. An *obligatio* is a *res*, an asset. This it is only from the point of view of the creditor, and it is *res* with which the *ius rerum* is concerned. *Obligatio* is defined as a *vinculum*, a bond, a notion which recurs in the word *obligatio* itself, in *contractus* and in *nexum*. The natural interpretation of this, indeed the only interpretation in the word *contractus*, is a bond tying two people together. But *contractus*, in the sense of a binding agreement or transaction is a post-Augustan word. In very early law when a man "bound himself," as we say, to another, he did it in a much more effective way than by merely creating a duty. As we shall see later, in dealing with *nexum*, he went into a sort of bondage, undergoing in fact a change of status, which not only subjected him to the other party, but altered his legal relations with people in general. It is therefore at least possible that this *vinculum iuris* was originally thought of not as a bond between *A* and *B*, but as a condition of subordination, in which the subject party was a bondsman by law, not a free man on level terms with other citizens. Similarly the definition states the duty as being *solvere*, which we understand to mean to render whatever the service due may be. But *solvere* primarily means to loosen, to set free, and the

¹ In. 3. 13.

suggestion is obvious that it originally meant "free himself" from the subordination in which he was placed—*se solvere* rather than *rem solvere*. In classical and later law, however, these interpretations even if correct as matter of history, have lost practical importance.

Obligatio is essentially personal, a conception which has important results. Obligation *ex delicto*, to pay a penalty for a wrong done, died with the wrongdoer, and it may be that this was at one time true of all obligation, as it certainly was of the earliest contracts of which we have any detailed knowledge. An obligation could not be assigned by either party, though, as we shall see, methods were found of circumventing this principle. Again where *A* made a contract and his son or slave did something which would have been a breach of the contract had *A* done it, or *vice versa*, the slave made the contract and the master did the act, there was great difficulty in seeing in this any breach of the contract. How could *A* break a contract which *B* had made? It was only gradually and imperfectly that this difficulty was surmounted by means which we need not here consider. Again, even in the time of Justinian, it was in general impossible to acquire rights on contracts made by a representative or "agent," other than a member of the *familia*, a rule which looks impracticable to moderns, to whom rights so acquired seem essential to commerce. In Rome the only method of effecting this was for the representative to assign his rights by the devices above mentioned.

96. Leaving the difficult question of the exact sense in which the word *obligatio* was used at different times, in Roman Law, and the further question of the various ways in which obligations may be classified, we have now to discuss the different kinds of obligation as they are treated in the Institutes, arranged under four heads, according to the nature of the fact which brings them into existence, i.e., contract, quasi-contract, delict and quasi-delict.

CONTRACT. Apart from any broader meaning which the word *contractus* may have had in earlier law, we may take it, for the purpose of this classification, and subject to an exception in regard to *fiducia* to be considered later, as meaning an agreement enforceable by a civil law action. There were other forms of agreement, enforceable by praetorian actions, but these were not called contracts, apparently for no better reason than the original

limitation of the notion of *obligatio* to civil law relations. While Justinian, in the Institutes, does include under the head of *obligatio* a number of praetorian rights, he never extends the name "contract" to agreements enforceable only by praetorian methods, though, in view of the fusion between praetorian and civil law, there is no obvious reason why he should not.

Contracts are classified under four heads according to the mode of formation, but there are other ways of classifying them. We must bear in mind that there were two types of contract, those which were unilateral, in which one party alone acquired a right and the other alone was under a duty, and those which were bilateral, in which each party had certain duties to the other. This distinction exactly corresponds with another. The unilateral contracts were, to use Justinian's language, *stricti iuris*: they gave rise to a *strictum iudicium*. The bilateral contracts were *bonae fidei*, i.e., they gave rise to *iudicia bonae fidei*. The primary importance of this distinction is in connection with procedure.

Since contractual obligation arises from agreement, a concurrence of wills, it follows that it can arise only between persons capable of legal acts. Thus a lunatic or an *infans* could not validly contract. We need not here go into questions of capacity: most of the chief points were dealt with under the Law of Persons, and certain cases of incapacity resulting from the characteristics of specific contracts will be dealt with in connexion therewith.

Unilateral contracts, no less than bilateral, rest on agreement between the two parties: in ultimate analysis there is an offer by one party and an acceptance by the other. There is an accord of two minds (*ad idem*), an agreement as to acts of one or both. But, in Roman Law, an agreement did not necessarily amount to a contract: it was not a contract unless the law made it such. Some agreements were made binding contracts by reason of the forms observed, others by reason of delivery of the subject matter of them, others again by reason of mere assent. This principle, that an agreement is not a legally binding and enforceable contract unless it satisfies certain requirements, is sometimes stated in the form, drawn from a text in the Digest¹, that "*quum nulla subest causa praeter conventionem, hic constat non posse constitui obligationem: igitur nuda pactio obligationem non parit, sed parit excep-*

¹ D. 2. 14. 7. 4.

tionem.” It has been doubted whether this text was written in its present form by Ulpian, to whom it is credited, and it is open to criticism, but it at least brings out the point that an agreement is not necessarily a binding contract.

The binding force of agreements, however formal, is hardly a primitive notion. Even the XII Tables, which are far from primitive, have little to say of contract. There is some evidence that oath (*iusiurandum*) was binding in some way, but in what way and in what cases is uncertain. They also contain a reference to *nexum*¹, but it is far from certain that *nexum* can properly be regarded as a contract. The earliest contract of which we really know any details is *stipulatio*, a contract in the form of verbal question and answer, the history of which we shall have, later, to consider. Apart from some other forms of verbal contract the next to appear seems to be the written contract, also formal. Towards the close of the Republic we find the contracts *re*, formed by the delivery of a chattel, and, at about the same time, a group of consensual contracts, i.e., contracts in which the mere agreement is binding. The verbal and written contracts (*verbis, literis*) were unilateral, creating an obligation on one side only, but the “real” contracts, with the exception of *mutuum* (an exception of which the explanation is historical) and all the consensual contracts, are bilateral, i.e., create duties on both sides. There is some historical development here, to which we shall return.

We have spoken of contract as resting on consent, with, in most cases, some other requirement. Those contracts in which more than consent was needed must not be thought of as, necessarily, formal contracts. In the contracts *re* what was required was an act constituting a definite furtherance of the transaction (it may be loosely called part-performance), and this is not a form. The verbal and literal contracts were formal in that they required a strict form to make them binding. But there is another sense in which a contract may be said to be formal. Form might conceivably suffice, whether there was real consent or not. A *mancipatio* was valid even though compelled by force², though in historical times there was a machinery for setting it aside. The same was probably true of *nexum*, and possibly in the earliest applications of *stipulatio*.

¹ Girard, *Textes* (5), p. 15.

² P. I. 7. 6, 8.

But, however this may be, *nexum* was obsolete very early and in the law as we know it consent was always essential.

97. Consent being necessary, we have to consider what circumstances might make an apparent consent unreal. The causes to be discussed are fraud (*dolus*), violence or threats (*metus*) and mistake.

DOLUS. A consent obtained by fraud was none the less consent, and the transaction was *prima facie* valid. But in *stricti iuris* transactions, if there was serious fraud, and this point was expressly raised in the action (*exceptio doli*), the action was lost¹. In *bonae fidei* transactions, as the *iudex* was instructed, in all such cases, to order payment only of what was due *ex fide bona*, the point of *dolus* could always be raised by the defence without any express *exceptio*, and the condemnation reduced, or the action dismissed, as the case might require. Where the transaction had been completed, there would always be, in the absence of any other remedy, an *actio doli* for the loss caused by the fraud. But where what had been done by the aggrieved party was the handing over of property or the like, there was usually a *condictio*, a personal action for the recovery of what had been handed over or its value.

METUS. This means threat of immediate death, or severe injury, to the party or to some member of his family. It seems clear that in the ancient formal transactions, *mancipatio* and *nexum*, the transaction was valid at civil law, though the Praetor gave relief by an *exceptio metus* if action was brought on the transaction and by an *actio metus* to recover what had been paid, or by *restitutio in integrum* in some form. Apart from such cases the texts leave room for difference of opinion. A few texts declare the transaction void, and in the earlier texts *metus*² is put on a level with *vis*, physical compulsion, which would certainly negative consent. But the majority of the texts dealing with *stricti iuris* relations treat the transaction as valid (*quamvis si liberum esset noluissem, tamen coactus volui*³), subject to the praetorian reliefs already mentioned, and this seems to have been the real doctrine of classical and later law. As to *bonae fidei* transactions the texts are unsatisfactory. It must be remembered that the words "*ex fide bona*," in the instructions to the *iudex*, would make it possible to take the point of *metus* without any express statement of it in the *formula* of the action, so that it would not greatly matter whether it was absolutely

¹ G. 4. 117.

² D. 4. 2. 1.

³ D. 4. 2. 21. 5.

void or thought of as valid subject to relief. On the whole the latter is the more probable view.

MISTAKE. Where a man consents, believing that he is consenting to something entirely different, he can hardly be said to have consented at all to the actual transaction. Hence the rule that where mistake affects a contract at all, it avoids it for lack of consent. There is no contract: it is no case for praetorian relief. But where a man has expressed himself in clear terms, on which the other party naturally relies, it is not obviously fair that he should be allowed afterwards to say that he did not really mean what he said, even if, as would of course be necessary, he proved this to be so. There is always the difficult question whether the law is concerned with the man's real intention or with the intention which he has expressed. The rules arrived at were no doubt a compromise and it is not possible to reduce them to any clear principle. In *stricti iuris* contracts (the case in view is always *stipulatio*), the promisor was not bound if there was a mistake of identity and the identity of the other party was material. It seems clear that if there was no mistake as to the identity of the subject matter, a mistake as to its qualities was immaterial. But we are told that where the parties were thinking of different things there was no consent and no contract¹. Where the agreement was clear this rule seems somewhat unfair, and it is sometimes explained away as applying only where the party not under the mistake knew of the other party's error. But though the resulting rule looks reasonable, there is no authority for the limitation. In *bonae fidei* transactions (sale is the usual case), the rule was that fundamental mistake avoided the contract; but that is not helpful without a rule to determine what is fundamental. No such rule is laid down—perhaps none could be—but many cases are dealt with. Error as to the nature of the transaction (e.g., one party intends loan, the other sale), as to identity of what was sold (but not as to a mere accessory), as to quantity or price (if to the prejudice of the party under the mistake) and probably as to identity of the other party, where this was material, all avoided the contract². Error as to the qualities of the thing sold was not ignored, as in *stricti iuris* relations, but if it was very important (*error in substantia*) it avoided the contract, though there are traces of an opinion which

¹ In. 3. 19. 23.

² D. 44. 7. 3. 1.

refused to take it into account at all, and it may well be that the whole notion of *error in substantia* is due to Justinian. No principle was laid down as to what amounted to such error and modern opinions are divided. On one view the error must have been such that the thing and what it was supposed to be were in different commercial categories. On another the error must be such that the contract would certainly not have been made in knowledge of the facts. But, in truth, the Roman texts do not lend themselves to any clear-cut rule. It has been suggested that many of them have nothing to do with mistake as such, but with misdescription, and lay down the rule that misdescription in an important point avoided the agreement, while, if it was in a minor point, there was a claim for compensation.

98. A further requirement of contract was that it must be possible¹. The meaning of impossibility has already been considered: here it is enough to say that it means inconceivability: *de facto* impossibility to the party was immaterial. The impossibility might be physical or legal. But of the rule that impossibility avoided the contract there is an important modification. In cases of legal impossibility the impossibility might not be obvious. A man sold in good faith as a slave might really be a freeman. Land sold might be *res sacra* or *publica*. In the case of the freeman, classical law gave the buyer an *actio ex empto*, i.e., on the contract, because of the difficulty of telling a slave from a freeman. In the case of land there was no sale, but an *actio in factum* lay. In each case the damages given depended on the question whether the vendor was in good faith or not. In later law all these cases were put on the same level and an *actio ex empto*² was given. All this has no application to *stricti iuris* relations. Here there was no remedy except in case of fraud, when there were the praetorian remedies already mentioned. But if the *stipulatio* formed part, as it usually would, of a group or pair of transactions under which the promisee in the case of the *stipulatio* for an impossibility had performed or bound himself to perform, the nullity of the counter *stipulatio* would enable him to recover what he had paid, or to defend any action on his undertaking.

These rules apply to initial impossibility. If a contract became impossible after it was made, e.g., by destruction of the subject

¹ G. 3. 97; In. 3. 19. 1.

² In. 3. 23. 5.

matter (such supervening impossibility was called *casus*), the general rule was that the person liable to render was discharged, unless the destruction etc. was in some way imputable to him or he was *in mora*, i.e., had already failed to carry out the obligation when it was properly demanded¹. Where unimputable *casus* released the promisor, any counter stipulations were in the same position as in the case of initial impossibility, subject, in sale, to a remarkable rule of risk which we shall have to consider².

MODALITIES. A contract was not necessarily a simple promise on one side or both. There might be many restrictions on the undertaking, which, so far as they were more than definitions of what was promised, or alternatives or the like, were either *dies* or *condicio*.

Dies is suspension of the undertaking or liability till a future day, certain to come, though its date may or may not be certain (on the Kalends of next July, on the death of X). The obligation exists, though it is not yet enforceable. Thus if money so promised was paid before the day it could not be recovered as an *indebitum*. This is suspensive *dies*, *dies a quo: dies ad quem* was on a different footing. The rule of civil law was *ad diem deberi non posse*³ and indeed it looks absurd to agree that money shall be owed till a certain date and not afterwards. But there were difficulties in this matter which will be considered later⁴.

Formal *actus legitimi* did not admit of suspension, but *dies* seems admissible in all the contracts of classical and later law, though this is not quite clear for the contract *litteris*.

A conditional contract is one made subject to a future and uncertain event, *incertus an*, whether *incertus quando* or not. Such a contract was in an equivocal position. It existed, for the person bound could not withdraw. The parties must have been *capaces* when it was entered into, and, according to the texts, the rights and liabilities under these, as under simple contracts, passed to the *heres* on death⁵. There are many rules which seem based on the conception of the contract as not existing till the condition was satisfied. In sale the risk did not pass to the buyer till then. A conditional debt if paid could be recovered as an *indebitum*, so long as the condition was outstanding⁶. According to some texts,

¹ D. 22. 1. 32. pr.

² *Post*, § 109.

³ In. 3. 15. 3.

⁴ *Post*, § 102.

⁵ D. 46. 2. 24.

⁶ D. 12. 6. 16. pr.

though others conflict, an action brought while the obligation was conditional was a nullity, and the inevitable loss of it did not bar renewed action when the condition was satisfied¹. There are other conflicts turning on this point.

These and some other apparent conflicts are sometimes explained by reference to an analysis of obligation into two elements, *debitum*, the thing which ought to be done, *obligatio*, the fact that someone is bound to do it. It is held that this distinction, traceable in other systems of law, was recognised also in early Roman Law though by the classical age it is obscured. In early law, it is said, if, e.g., an undertaking was given it "ought" to be carried out, but had no legal enforcement unless someone had bound himself to carry it out, binding himself meaning, as we have seen in that age, subjecting himself to treatment as a pledge for the *debitum*. There is then an *obligatio*, though the person bound was not necessarily the person under the *debitum*. Thus in a conditional debt there is an *obligatio*, for someone has bound himself, but there is nothing which "ought" to be done till the condition is satisfied. Thus the party liable cannot withdraw, for there is an *obligatio*, but what is paid can be recovered, for there is no *debitum*. But the applicability of this notion is controverted.

All the contracts of later law might be conditional, but *nexum* and the contract *literis* could not. And as we shall see, it was doubted in earlier classical law whether there could be conditions in consensual contracts, i.e., whether, if such a contract was under a condition, there was a contract for any purpose at all, so long as the condition was outstanding.

If the condition failed, the contract ordinarily failed. When it was satisfied the contract was fully operative. The satisfaction must be complete: partial satisfaction was no satisfaction. But a condition was treated as satisfied, when in fact it was not, if satisfaction was prevented by one interested in the non-satisfaction, provided this was in bad faith and with a view to prevention². Thus if a promise was conditional on an act by a third party, who did not do it, this was not prevention.

Impossible, illegal or immoral conditions avoided the contract and were not struck out, as in wills. Thus promises to a man if he did a wrong or if he did not, were equally bad, the latter being

¹ In. 4. 6. 33; D. 20. 1. 13. 5.

² D. 40. 7. 38.

a sort of blackmail¹. If a condition became impossible after the contract was made, the contract failed, not for impossibility, but because the condition was not satisfied.

The foregoing conditions are suspensive: the obligation was suspended till the condition was satisfied. The so-called resolutive conditions, the contract to be void if an event happened, were, apart from consensual contracts, null at civil law, as *dies ad quem* was. But they were convenient, e.g., a promise to pay 10 “*nisi navis ex Asia venerit*,” a sort of marine insurance. Accordingly the Praetor took account of such conditions, giving an *exceptio* if an action was brought when the event had happened. But consensual contracts, arising by consent, might be annulled by consent, and this might be conditional, even at civil law. Such conditions (we shall meet them in sale) were thought of as conditions, not on the contract, but on its discharge: a sale under one was “*pura emptio quae sub condicione resolvitur*”².

99. From the strictly personal character of *obligatio* it followed that no man could contract so as to bind or benefit a third party, and similarly, that a promise (a) that a third party should act, or (b) to do some act for the benefit of a third party, imposed no liability on the promisor, since in (a) the promisor had not undertaken to do anything, and in (b) the promisee had no *interesse* and thus suffered no damage. Each of these cases must be considered.

A contract purporting to bind a third party could obviously give no right against him, and, conversely, a contract under which a service was to be rendered to a third party could, on principle, give him no right. But business needs compelled some relaxation of these principles. The rule that a *paterfamilias* acquired the rights under contracts by a son or slave did not constitute such a relaxation: it rested on the view that a subordinate member of a *familia* had in law no independent existence, and even the extension of the same principle, within certain limits, to usufructuary or *bona fide possessor*, though it does in fact constitute an exception, seems rather to have been thought of as a partition of the rights of a *paterfamilias*. There were other exceptions. In later classical law, if a thing deposited by A with B was redeposited by B with C, A had an *actio depositi utilis* against C³. The Digest contains other examples, mainly, as it seems, the result of inter-

¹ P. 3. 46. 2; D. 2. 14. 7. 3.

² D. 18. 2. 2. pr.

³ Coll. 10. 7. 8. (Paul).

polation, but they are not numerous and express no general principle: the rule still remained that *A* could not ordinarily acquire a right under a contract made by *B*.

There were more exceptions to the principle that a third party could not be liable under a contract. Within the family there was no such liability at civil law: it was the Praetor who made the *paterfamilias* liable to an extent varying with the facts on contracts by his subordinates. There were further important liabilities on contracts of employees not in the *familia*, also created by the Praetor, and the extension was carried further in later law. These various cases, in which outside the *familia* there is usually something in the nature of authorisation by the principal, will be considered later¹.

The other question to which such cases give rise is that of the rights or liabilities of the contracting party. Where *A* promises *B* that *C* will do something, and *C* does not do it, *A*, not having promised to do anything, is, on principle, not liable. It was usual to provide for this by a stipulation for a penalty if *C* did not do the act, and here there would be no difficulty. But the law went further. Contracts vary in their terms, and very little indication in the language would make the court hold that the promise was that *A* would procure that *C* should so act. Here there would be an action against *A* if *C* did not act and, in some cases connected with security in litigation, though not, so far as appears, in a wider field, the mere promise that *C* would so act was thus construed.

Where *A* promised *B* that he would do something for *C*, *B*, having no *interesse*, had ordinarily no action. But here there was an exception. Though the contract shewed no *interesse* in *B*, there might be one, and the rule was that if the thing which *A* agreed with *B* to do for *C* was one which *B* was under a legal liability to do, *B* had an *interesse* and an action². And, further, if *C* was *B*'s creditor or procurator, there was a sufficient *interesse*³.

A rule similar to that against contracts for third parties, but, as it seems, independent in basis, is the rule that a *stipulatio* or *promissio* for the *heres* (I promise that my *heres* shall pay, I promise to pay to your *heres*) was void. The *heres* may be thought of as a third party, but the reason of the rule is that, as the *heres* inherits the rights and liabilities of the deceased, steps into his legal shoes,

¹ *Post*, § 122.

² *D.* 45. 1. 38. 21.

³ *In.* 3. 19. 20.

it was illogical to regard him as taking over obligations which could never conceivably have affected the deceased: "*inelegans visum est ab heredis persona incipere obligationem*¹."

100. Before passing to the contracts of classical and later law we must consider two transactions not handled in the institutional treatment of contracts, *nexum* and *fiducia*.

NEXUM. The questions connected with this enigmatical institution, which was obsolete long before Gaius wrote, are too controversial for these pages. What is actually known of it may be summed up as follows. Literary and juristic texts shew that in the earlier part of the Republic there were debtors who were *nexi* as a result of a process like *mancipatio*, perhaps with different words, that these debtors were in a state of *de facto* slavery and suffered great hardships, and that this state of things was ended by a *Lex Poetelia*², of about 300 B.C., under which *nexi* were released and the seizure and practical enslavement were abolished for the future. In the result the transaction called *nexum*, though not abolished, went out of use. There are also texts which speak, in the same connexion, of *aes nexum*. As the position of judgment debtors, which was even worse than that of *nexi*, was not affected by this legislation, it is inferred that *nexum* had had executive force, i.e., that the debtor who had engaged himself in this way, might be seized without judgment and held in bondage and that it was this executive force which was abolished by the *lex Poetelia*. The view most generally held in the nineteenth century was stated, not for the first time, by Huschke. For him, *nexum* was a contract *per aes et libram*, by which a borrower declared himself *damnas* if he failed to pay his debt, the process taking place when the money was lent, the loss of status being then a possibility of the future. According to Huschke this *damnatio* in early law, whether in a statute or in a will or in a contract, gave the creditor a right to *manus iniectio*, under which the person liable could be brought before a magistrate, the grounds of the seizure stated, and the debtor then *addictus* to the creditor. But the *manus iniectio* and resulting *addictio* are not proved by the texts, which rather suggest a seizure without any intervention of authority. This and other difficulties have led to a revival with various modifications of the older view stated, not for the first time, by Niebuhr, that *nexum*

¹ G. 3. 100.

² Cicero, *De Rep.* 2. 34. 59.

was really a self *mancipatio*, and not a contract at all, antedating indeed the notion of binding contract. Just as men handed over property in early times to be forfeited if an undertaking was not fulfilled; here the debtor formally conveyed himself on the same terms. There is the difficulty that *mancipatio* with suspended operation is inconsistent with what we know of it in later times, and it is suggested that it operated at once, the self sale being resorted to only by a debtor liable to immediate judgment, so as to avoid the sale into actual slavery which was the lot of defaulting judgment debtors in early law. There is the further difficulty that self sale, common in other systems of law, does not otherwise appear in Roman Law, and it has been suggested that a debtor *paterfamilias* mancipated his son in this way. Other explanations have been offered which dispense with both the notion of contract and that of self *mancipatio*, but these appear to be rather improbable. Thus it may be said that Huschke's view, modified in details but retaining the conception of the transaction as essentially a contract, and Niebuhr's also, and still more, modified, but retaining the conception of the transaction as essentially self *mancipatio*, practically divide modern opinion.

FIDUCIA. This was an agreement accompanying, but not forming part of, a transfer of property by *mancipatio* or *cessio in iure*: it is not found in connexion with *traditio*. The transferee became owner of the property, and the *pactum fiduciae* was substantially an agreement by him as to what should be done with it in certain events. It might contain a number of provisions, but its main importance was this regulation of the ultimate disposal of the property. It was only an agreement, and had no effects *in rem*. Thus, if the transferee, the *fiduciarius*, in breach of his agreement, transferred the ownership to someone else, this transfer was perfectly good, the only remedy of the original owner being against the fiduciary, under the agreement¹.

The agreement was informal: the fact that it accompanied a transfer of property gives it a certain analogy with the contracts *re*, which rest on delivery of a chattel. It is not however called a contract, perhaps because it had no independent existence but was always an appendage to another, a very formal, transaction.

Fiducia had many applications in the law both of persons and of things. In the former we have met it in *adoptio*, in *emancipatio*,

¹ See V. 18 (imperfect).

and in *tutela*¹. In these cases the remedy for a breach of the *fiducia* was not an action on it (*actio fiduciae*), but apparently compulsion by the magistrate². In the Law of Things its many applications are of two types, *fiducia cum creditore* and *fiducia cum amico*. The former was transfer of property as security for a debt, to be restored when the debt was paid, but the complex rules of this institution will be considered later, in a general discussion of the law of security for debt. *Fiducia cum amico* had a constantly narrowing field, as simpler ways of providing for the need were introduced. Before the informal contracts of loan (*commodatum*) and deposit were introduced, it was common to hand over the ownership with a *fiducia* for its return. *Donatio mortis causa* might be made by an immediate transfer of ownership, subject to a *fiducia*, but in classical law a suspensive condition was more usual. A slave might be transferred with a *fiducia* for manumission, but under M. Aurelius the liberty took effect automatically at the agreed time.

The remedy in *fiducia* in the law of things was an *actio fiduciae*, with an *actio contraria* for the person under the trust. It was a *bonae fidei* transaction. What is known of the formula in the action contains archaisms which have suggested the view that it dates back to the *legis actio* procedure. But, as there are indications of a formula *in factum*, a purely praetorian remedy, it is more probable that here as elsewhere we have a remedy introduced by the Praetor and ultimately adopted into the civil law, and this involves an origin later than the introduction of the formula.

In *fiducia cum amico*, where the intent is to carry out a wish of the transferor, it was reasonable that if he changed his mind he should be able to recover his property. The remedy would be a personal action, a *condictio*. In Justinian's law this is called *condictio ex poenitentia*, but the name is not classical, and there is controversy as to the extent of the right of revocation itself in the classical law. *Fiducia* was obsolete under Justinian.

101. The Institutional classification of contracts is under four heads³, *re, verbis, literis, consensu*, i.e., those based on delivery of a chattel, on a form of words spoken, on a written form and on mere consent. The order, which is probably older than Gaius, is hardly that of importance or chronological, but is probably based on the

¹ *Ante*, §§ 26, 30, 37.

² See, e.g., G. I. 137a.

³ M. 3. 13.

treatment in the Edict. The scheme, which gives two classes of formal, and two classes of informal, contract is convenient but has its disadvantages. It does not coincide with the distinction between *stricti iuris* and *bonae fidei* transactions, for one of the contracts *re*, *mutuum*, loan of money or other "fungibles," is *stricti iuris*, while the other contracts *re* are *bonae fidei*. The formal contracts are not a homogeneous class. The most important verbal contract, *stipulatio*, was in classical and later law a model in which any sort of bargain could be expressed. The other formal contracts were forms for only one kind of transaction. But, as we shall see, *stipulatio* was originally only for one purpose a promise of a sum of money. The classification, however, can hardly date from times when this was true.

CONTRACTS *VERBIS*. Of these we have to consider three of which *stipulatio* was by far the most important.

*STIPULATIO*¹. This was a contract made by formal question and answer, unilateral, i.e., imposing a duty on the promisor only, and *stricti iuris*, i.e., giving the stipulator a *strictum iudicium*. At first it was necessarily in Latin. Its most solemn, and probably oldest form was "*Spondes-ne?*," "*Spondeo*," a word which, by reason of traceable religious associations and some suggested etymologies, has led to the view that *stipulatio* was a secularisation of a religious undertaking, perhaps by oath. The starting point of this secularisation is uncertain. In dealing with the law of suretyship we shall see that certain stipulations used for this purpose of guaranty (*sponsio*, *fideipromissio*) were subject to rules which suggest high antiquity, and it has been suggested that the earliest use of *stipulatio* was for the purpose of undertakings by or for parties to litigation. On another view *stipulatio* began in promises of penalties for wrongs under the XII Tables, these being, normally, fixed amounts. However this may be, there is evidence that the earliest stipulations were for *certa pecunia*. The form was gradually extended, first to *certa res*, then to *incerta* and finally to services (*stipulatio faciendi*) so that it became available for any kind of bargain. All this seems to have occurred at least a century before the founding of the Empire, and it may be added that, by this time, other words might be used: *dabis-ne?*, *dabo*, *promittis-ne?*, *promitto* and others. Relaxations of form continued throughout

¹ M. 3. 15-19; G. 3. 92-110.

the Empire. In classical law any language might be used, and by the end of the classical period even different languages, provided that question and answer were in agreement. It may be that throughout the classical age this meant not only substantial agreement, but literal, and an enactment of Leo (A.D. 472), somewhat obscure in its terms, may have first provided that if the question and answer were in substantial accord it was indifferent in what terms they were expressed. There are many passages in the Digest in which this doctrine is attributed to classical jurists. It is possible that all these are interpolated, but it is equally possible that many of them are genuine and that Leo was only generalising on an established practice.

In the law as stated in the Digest, even substantial agreement might be dispensed with in some cases. In the time of Gaius, where the *stipulatio* was for a certain quantity, and the promise was for less or more, there was no contract. But in the Digest, in this case and in that of a *stipulatio* for two things and a promise of one, or *vice versa*, the *stipulatio* was good for the element which was common, the lesser quantity, the one thing, and it is not clear whether this is due to the jurists to whom it is attributed or to the compilers of the Digest¹.

It is a reasonable precaution to express agreements in writing, especially where, as in *stipulatio*, the law does not require witnesses, and, in the Empire, this course was usual. Severus provided that if a memorandum (*cautio*) alleged a *stipulatio*, even though it was not itself in question and answer form, and did not specify that all the acts essential to a *stipulatio* had been duly performed, a *stipulatio* should be presumed, and Paul tells us² that this presumption was conclusive, at any rate where the *cautio* expressly alleged *stipulatio* and *promissio*. A text in the Digest says that it was still open to the parties to prove that only a pact was meant (which would not be an actionable contract) and thus the presumption was not conclusive, but this may be due to the compilers³.

On these facts, and the evidence of some other texts, it is held by some writers that by the time of Justinian, *stipulatio* had become a written contract, i.e., that the written allegation, duly executed, of a *stipulatio*, was in fact the contract, and thus *stipulatio* was now

¹ G. 3. 102; M. 3. 19. 5; D. 45. 1. 1. 4.

² P. 5. 7. 2.

³ D. 2. 14. 7. 12.

only in name a verbal contract. It is also maintained, though with less plausibility, that whether there was a writing or not, there was now no need of an actual question and answer: all that was required was that the writing or conversation should make it clear that a *stipulatio* was meant and not a mere pact. If this is so, it is surprising that the Digest should state and give much space to the rules about question and answer.

Stipulatio must be completed at once: a promise was ineffective to create a contract if more than a trifling interval of time elapsed between the question and the answer. It required the presence of the parties: there could be no *stipulatio* by correspondence. But on this rule Justinian introduced a limitation. If there was a duly dated memorandum of a *stipulatio*, alleging presence, this could be rebutted only by proof that a party was absent on the whole of that day from the place at which it was dated¹.

Apart from the general rules as to capacity to contract, there are special rules in *stipulatio*, some of which are due to the requirement of a verbal declaration.

No *infans* or deaf or dumb person could be a party, a rule which survived in Justinian's law notwithstanding the general use of a written form. The difficulty could be met by the employment of a slave or *filiusfamilias*. But in making a *stipulatio* through a subordinate there was a pitfall. The words were of course exactly construed. If, therefore, a slave stipulated to be allowed to cross a field (not, i.e., for a legal servitude), the right under the contract was acquired by the master, but he acquired only what was stipulated for, i.e., that the slave could cross the field, not that he himself could. This could be avoided by using apt words. There was a further more important point. If a slave stipulated that he should have a right, e.g., a right of way (*mihi dari ius eundi*) this was necessarily void, since a slave could not have a *ius*. He must be careful to use his master's name, or say simply "*dari ius eundi*." Where this precaution was not taken the lawyers, so far as possible, understood the words in a *de facto* sense, which gave the contract some force, though usually not what was intended². As a slave's capacity was derivative he could acquire by *stipulatio* only for a master who was capable of acquiring. If a slave stipulated for a servitude, this was good only if his holder owned the land to

¹ C. 8. 37. 14. 2.

² D. 45. 1. 38. 6-9.

which it was to attach¹. If a slave stipulated on behalf of a *hereditas iacens* to which he belonged, or a slave of a *captivus* stipulated, the acts would be void unless a *heres* entered, or unless the *captivus* returned with *postliminium*.

The form *spondes-ne?*, *spondeo* could be used only by *cives*. In any other form the contract was open to peregrines and hence is said to be *iuris gentium*.

102. *Stipulationes* are classified by Justinian as *iudiciales*, or *praetoriae*, or both, or *conventionales*. The first three are procedural, those imposed by the *iudex* in the course of judicial proceedings, as security, those imposed in the same way by the Praetor and those which may, in appropriate cases, be imposed by either. All these are contracts only in name, since they could be compelled in various ways, and the terms fixed were not settled by the parties, but by the *iudex* or Praetor². The fourth class is the *stipulatio* of everyday life: it is that with which we are mainly concerned.

As we have seen, contracts for third persons were void. But the case might occur of a *stipulatio* in which a third party was joined with the contracting parties. It might be agreed between *A* and *B* that *A* would pay ten to *B* and *C*, or that *A* and *C* would pay *B* ten. The Sabinians held that the reference to *C* was mere surplusage and that all was due as between *A* and *B*. On the Proculian view, which prevailed in later law, there were two stipulations of which that which concerned *C* was void, so that only five were due, except, indeed, on a principle already discussed, where *B* had an *interesse* in the payment to *C* and thus could recover the whole. But this solution applied only to *stipulatio*: in *bonae fidei* contracts the Sabinian rule applied.

Where *A* promised *B* that he would pay ten to *B* or *C*, this was valid, but only *B* could sue. But *A* could perform by paying *C*, who was said to be *solutionis causa adiectus*. An analogous rule was applied, at least in later law, where *A* promised *B* that he or *C* would pay.

As we have seen, contracts *post mortem*, or to bind or benefit the *heres* alone, were void till Justinian. The same was true of a promise "so many days before I (you) die" because, says Gaius, as it cannot be known that one is dead till after the death it is

¹ 45. 3. 17.

² G. 3. 105; In. 3. 19. 7.

substantially *post mortem*. This explanation does not account for the validity of stipulations "at death," justified on the ground that death is the last moment of life. The *stipulatio pridie mortis*, or the like, seems to be only a case of *stipulatio praepostere concepta*, such as "I promise to pay to-day if my ship arrives next week." These also Justinian validated, leaving out the impossible part, in this case the word "to-day¹."

We have seen that *ad diem deberi non potest*. But such things might be convenient. I might promise to lend *B* ten if he asked for it by a certain day and though civil law ignored the restriction, the Praetor gave an *exceptio* if a claim was made after the day². Liabilities subject to a resolutive condition, or undertaken *quoad vivam* (*vivas*) were similarly treated. But there is an odd statement in the Institutes as to a promise of *decem aureos annuos quoad vivam*. This we are told is essentially perpetual; with an *exceptio* after the death. But we have instances of agreements for a number, certain or uncertain, of annual payments which were quite good, the limit operating *ipso iure*, e.g., an annuity so long as I am in Italy³. Probably the statement in the Institutes is a mere blunder.

Exceptio (more properly *querela*) *non numeratae pecuniae*. Where a man has acknowledged a debt, in fact non-existent, e.g. a promise to repay a loan never made, he could, when sued, reply by an *exceptio doli*, or, without waiting for the creditor's action, bring a *condictio* to recover his acknowledgement. But the burden of proof was on him and it is not easy to prove a negative. In the course of the second century a better remedy was provided. The debtor was allowed in reply to his acknowledgement, to plead the defence that the money had never been lent, and the creditor had then to prove the debt independently of the *cautio*. At first it seems to have been allowed only in some exceptional cases and had to be raised within a year, or, if the creditor did not proceed, the *condictio* to recover the *cautio* must be brought within the same time, the burden of proof, here too, being on the creditor. It was generalised about the time of Diocletian and extended to five years. Justin excluded it unless supported by written evidence, where the *cautio* specifically alleged a debt. Justinian cut it down to two years, but there was a machinery of protest by which at any time within the two years it could be made perpetual. But he extended

¹ In. 3. 19. 14.

² D. 44. 7. 44. 1.

³ D. 4. 6. 43.

it, with other limits of time, to other cases, even to receipts¹. When the time had expired it is not quite clear whether the acknowledgement was conclusive or there was still an *exceptio doli*. This remarkable procedure which imposes the burden of proof on a creditor holding a clear acknowledgement, so that it is useless as evidence, seems to have been part of the system, prominent in the later Empire, of protection of the poor against the *potentiores*, the wealthy classes who had, and used, great means of oppression. It was never, properly speaking, an *exceptio*, for it does not seem to have been operative in the formulary system, in which alone there were true *exceptiones*.

As we have said, the remedy for *stipulatio* was a *strictum iudicium*. Where it was for a *certum* the remedy was *condictio*: where it was for an *incertum*, which would include a service, it was the *actio ex stipulatu*, an action in a somewhat different form. The reason why no *condictio* was applicable in this case seems to be that *condictio* for *incerta* is a rather late development, dating only from the Empire, while *stipulatio* for an *incertum* was much older and was provided with a special remedy which was not superseded when *condictio incerti* came into existence.

103. We have been considering *stipulatio* as a transaction between two persons. There might obviously be more than one on each side, and these cases of joint obligation will be considered in a later chapter. There might also be subordinate parties, or, more properly, parties to a subordinate *stipulatio*, distinct from the principal *stipulatio* but having the same subject matter. These might occur on either side—*adstipulatores* or *adpromissores*.

*ADSTIPULATORES*². An *adstipulator* was a person utilised to reinforce the main *stipulatio* by stipulating with the *promissor* for the same thing. This expedient was employed in two cases. Under the *legis actio* system of procedure it was impossible to sue by representative: the principal must be the actual party. If, from absence or other cause, he was unable to sue when action became necessary, the *adstipulator* would sue on his *stipulatio*, accounting to his principal for the proceeds. As representation was allowed in the formulary system, this case was obsolete in classical law. Again, where the main *stipulatio* was bad as being *post mortem stipulatoris*, the contract of the *adstipulator* would be good: there

¹ C. 4. 30. 14.

² G. 3. 110-114.

was no objection to a *stipulatio post mortem* of a third party. Justinian's changes made the device no longer necessary and the *adstipulator* has disappeared from his law.

As the *adstipulatio* was expressly for the same thing: "*idem mihi dari spondes-ne?*" the principle which we can describe provisionally as *non bis in idem* operated, and payment to or action or release by, either principal or *adstipulator* destroyed the *obligatio* altogether. Accordingly the *lex Aquilia* penalised an *adstipulator* who fraudulently released the debtor¹. The existence of this rule shews the antiquity of *adstipulatio*, for it would not have been needed had the informal contract of *mandatum* been in existence. Under that system the *adstipulator* would have received a mandate to act, and would have been liable under the mandate for any breach of his duty. There was indeed a double penalty *contra infitiantem* under the *l. Aquilia*, which Gaius gives as the purpose of that remedy, but it is rather the cause of its survival: the historical point was not known to Gaius. Its intensely personal character is another mark of the antiquity of *adstipulatio*. The rights of *adstipulator* did not pass to his *heres*. A slave or a person *in mancipio* could not be *adstipulator*. If one in *manus* or *potestas* was *adstipulator*, the right of action did not vest in his *paterfamilias*, and the *filius* himself could not sue unless and until he became *sui iuris* without *capitis deminutio*.

An *adstipulatio* was purely accessory, it could not be for more than the principal claim, though it might be for less, and it might be conditional or *ex die* where the main *stipulatio* was *pura*, but not *vice versa*.

*ADPROMISSORES*². These were persons who promised on behalf of the principal debtor. They were sureties, persons from whom the creditor could recover if the debtor failed to pay. The rules affecting them will be considered later together with other forms of security for debt: here it is enough to say that suretyship by an accessory *stipulatio* is the most prominent case of personal security in the texts and that it occurs in three forms, *sponsio* and *fidepromissio*, which are the oldest and were used only where the principal debt was itself on a verbal contract, and *fideiussio*, which, while itself made by *stipulatio*, might be used to guarantee any form of debt.

¹ G. 3. 215.

² G. 3. 115-126; In. 3. 20.

Two verbal contracts, other than *stipulatio*, must be mentioned.

Dictio dotis. *Dos*, we are told, could be created by actual transfer (*datio*), by *promissio* (*stipulatio*) or by formal declaration (*dictio*)¹. This was a solemn declaration by the donor in the presence of the *vir*, but with no need for any act on his part, that some property or a right of some kind should be *dos*. The form was "*fundus Cornelianus tibi doti erit*." It might be conditional. It created an *obligatio*, and the remedy was apparently a *condictio*. But only the woman herself or her paternal ancestor or a debtor authorised by her could so create *dos*. The form dates from the Republic and seems to have been in common use throughout the classical age of law. The latest reference to it is in an enactment of A.D. 396. In A.D. 428 an informal promise (*pollicitatio*) of *dos* was made enforceable² and *dictio dotis* disappeared, if indeed it had not already gone out of use.

*Iusiurandum liberti*³. On the freeing of a slave, gratuitously and not in execution of an obligation to free, the master might exact an undertaking to render certain services, *operae*. As the slave could not bind himself before manumission, and might refuse after, it was usual to put him under oath before the manumission with a resulting religious obligation to renew the undertaking after. The renewed undertaking was also frequently under oath: it is the only case of *iusiurandum* as a contract in historical times. But a stipulation served as well and was more usual. The *iusiurandum* was indeed less valuable, as its force was destroyed by any *capitis deminutio* of the patron. It was to be taken immediately on the manumission, though delay did not invalidate it. It was a verbal contract, capable of release and guaranty like *stipulatio*. It gave a *strictum iudicium*, the *iudicium operarum*, which had the peculiarity that a day-work, an *opera*, was treated as a unit of value, *dandum* not *faciendum*, and the action was thus on the lines of *condictio certi*. The contract, no doubt of great antiquity, survived into Justinian's law, though in his time it can have served little purpose.

104. THE CONTRACT *LITERIS* (*Nomina Transscriptitia*, *Expensilatio*). Of this contract little is certainly known. The generally accepted view of its nature (though sceptical views have been expressed), based mainly on the account of Gaius⁴, is as follows.

¹ U. 6. 1; 11. 20.

³ G. 3. 96.

² C. 5. 11. 6.

⁴ G. 3. 128-134.

The contract was called *nomina transscriptitia* and was made in two ways, or rather with one of two objects. It might be *a re in personam* where a previous dealing, binding or not, was turned into a contract *literis* by entering it with the debtor's consent, as a payment made to him. It might be *a persona in personam*, what was due from *A* being entered as due from *B*, of course with *B*'s consent. *B* was said to be *delegatus*: there would be earlier dealings, usually a debt from *B* to *A*, which accounted for this. It was immaterial how the debtor's consent was shewn, though a corresponding entry in his book would be convenient. The contract could not be conditional, though it is said that it might be *ex die*. As it was always for a sum certain and was unilateral, it was *stricti iuris*, the remedy being the *actio certae pecuniae creditae*, later called *condictio certae pecuniae*. This leaves much obscure. It is held that, as the name suggests, there were two entries (Cicero says "*nomina facit*¹") in the codex *accepti et depensi*, a cash book, one of the fictitious loan, and since, as there was no actual loan, the balance would be falsified, a corresponding entry on the other side of the book of an equally fictitious receipt. Hence the word *transscriptitia*. But though the view that it was an entry in an account book is nearly universally accepted, there are wide differences of opinion as to the actual mechanism of it.

Gaius remarks that it must be distinguished from *nomina arcaria*, which are *bona fide* entries of actual loans, in which the binding element is, as we shall see, the loan itself and not the entry. We learn that the defence of *non numerata pecunia* was available, which looks odd, since the loan was fictitious. Its application here however would be in cases in which the previous transaction was non-existent.

Gaius tells us that it was disputed whether peregrines could be parties to this transaction. It was agreed that they could not be creditors, and Nerva (i.e. the Proculians) held that they could not be debtors either, but the Sabinians held that they could be bound where it was *a re in personam* but not where it was *a persona in personam*. The point may be that peregrines had not this system of bookkeeping. He tells us also that *peregrini* had written contracts of their own, *syngraphae* and *chirographa*, of which the former were executed by or for both parties, and the latter only

¹ Cicero, *de off.* 3. 14. 59.

by one. In so far as these were at this time used by Romans they were purely evidentiary, but it is probable that among the hellenistic peregrines they were not merely evidence, but were the contract itself.

The contract *literis* is ancient and lasted to the later classical lawyers, perhaps, at their time, only among bankers, as the habit of keeping private accounts of this kind had long died out of Roman household practice. Justinian tells us¹ that these *nomina* were obsolete, but that there was still a contract binding by writing. Where a man had made a written acknowledgement of a loan, and there was no stipulation, and in fact no loan, but the time had expired within which he could plead *non numerata pecunia*, he was bound, and, as there was nothing but the writing, he must be bound by the writing. It is generally held that this is a confusion of thought. The practical effect is much as if he was bound by the writing, but in fact he was bound by the loan, of which he had provided evidence which he was no longer allowed to dispute. The practical effect was the same, but the legal analysis was different. There is however another opinion which now has many supporters. It is that by this time Greek notions had so far permeated the law that, whatever old texts might say, wherever a transaction was reduced to a formally executed writing, the courts treated the writing as the contract and not as mere evidence.

¹ In. 3. 21.

CHAPTER XIII

THINGS. OBLIGATIONS. CONTRACTS *RE* AND *CONSENSU*: INNOMINATE CONTRACTS

105. The contracts *re*, *mutuum*, *depositum*, *commodatum* and *pignus*, were so called because their binding element was the delivery of the subject matter. This delivery was not a form, since, if the *res* chanced to be already in the hands of the party who was to hold it under the contract the relation would be created with no actual delivery. It is hardly part-performance, for delivery, in deposit, is no performance of any service contemplated in the agreement, though in the other cases it may be so regarded. It does not seem necessary to analyse further than to say that in these cases, and these alone, the law did attach binding force to the agreement when the *res* had been delivered. The reasons and historical origins are not the same in all the cases. *Mutuum*, loan of fungibles, was a civil law conception and was originally based on the idea of unjust enrichment: money which ought to be *A*'s was in fact in the possession and ownership of *B*. It was only gradually that it came to be thought of as a contract. Deposit as a contract grew out of the Praetor's provision of an *actio in factum*, for single damages, for failure to return a deposit, to replace the severer penalties of the XII Tables, which had treated such a thing not as breach of contract, but as delict. *Commodatum* has much the same history, and both of them also replaced in practice the system of *fiducia* in which the ownership was transferred, though it is probable that this was employed only in important cases. *Pignus* was definitely a simplification of *fiducia cum creditore*, rendered possible by the praetorian protection of *possessio* so that the creditor was sufficiently protected without a transfer of the actual ownership.

*MUTUUM*¹. Loan for consumption, i.e., loan of money or of consumable things, "fungibles" (*quae mutua vice funguntur*), an equivalent amount of the same thing to be returned. It was unilateral, i.e., it imposed a duty on the borrower alone. It was *stricti iuris*, the remedy being the *actio certae pecuniae creditae* for

¹ G. 3. 90; In. 3. 19. pr.

money, the *condictio triticaria* in other cases. It was older than the other contracts *re*, but it is difficult to say when it was first recognised as a contract, as distinct from an obligation, independent of agreement, to restore money improperly retained by one. It should be noted that it was usual to accompany the loan by a *stipulatio* for return: when this was done the *mutuum* was superseded by the *stipulatio*¹.

Mutuum was gratuitous, but this meant only that interest, if desired, must be agreed for separately. Where this was done, as it commonly was, the transaction was sometimes called *fenus*. The promise of interest usually required *stipulatio*, but, in a few cases, pact sufficed. The rate was not unlimited: there was in fact much legislation on the matter in the Republic, the permissible maximum rate being changed from time to time. At the end of the Republic it was 12 per cent. *per annum*. Justinian established a scale of 4 per cent. for private loans and 6 per cent. for ordinary commercial loans. A loan for the purposes of a voyage (*fenus nauticum*, *pecunia traiecitia*) was on a special footing. It was a combination of loan and marine insurance, the money not being returnable unless the ship arrived safely. As the lender took serious risks the rate of interest was higher and, even under Justinian it was 12 per cent.² Compound interest (*anatocismus*) was forbidden³.

In *mutuum* the ownership passed to the borrower, and there was no *mutuum* (whatever else there might be), unless it did. It was not always a simple handing over of money by the lender to the borrower: commercial dealings are more complex. *A*, owing *B* money on some account, might be directed to pay it to *C*, who was to hold it as a *mutuum* from *B*. In such cases it might sometimes be difficult to see that the money was ever in the *dominium* of the lender. But convenience dictated this sort of relaxation, and, in fact, such cases will usually be found capable of analysis into one or other of the modes of *traditio*.

In ordinary *mutuum*, whether of money or other things, all risks were on the borrower: whatever happened to what was lent he was bound to return the equivalent at the proper time: there was no question of negligence (*culpa*).

A sc. Macedonianum, under Vespasian⁴, enacted as the result of

¹ D. 45. 1. 126. 2.

³ D. 12. 6. 26. 1.

² P. 2. 14. 3; C. 4. 32. 26. 2.

⁴ D. 14. 6; P. 2. 10.

the proceedings of a certain usurer, Macedo, provided that no action was to be given to one who lent money to a *filiusfamilias*, even though his *paterfamilias* had since died. The defence was raised by *exceptio*, and the transaction was not absolutely void: there was a *naturalis obligatio* on the borrower, of no importance as against him so long as he was still a *filiusfamilias*, but such that if he repaid the loan after he was *sui iuris* he could not recover it as an *indebitum*. And a surety who repaid the debt, at any time, could not so recover. This enactment, like analogous legislation in other systems of law, was aimed at thriftless young men "with expectations," and those who took advantage of them. Thus, general as its terms are, its application was subject to limitations in practice, where the evil which it was meant to check did not exist. It did not apply if the creditor had reason in the circumstances to think the borrower was a *paterfamilias*, or if the *pater* tacitly or expressly authorised the loan, or it was applied to the concerns of the *pater* or was for reasonable expenses such as he usually bore. And, as a *filiusfamilias* was treated as a *paterfamilias* so far as *peculium castrense* or *quasi castrense* was concerned, it did not apply if the loan did not exceed these funds.

It applied only to loans of money to a *filius* (or *filia*) *familias*, not to loans of other things or to other contracts, unless the facts shewed that there was really a masked money loan. It did not apply if the money was lent to a borrower *sui iuris*, though it was promised before, while it did apply if the promise was to a *paterfamilias*, and the loan was made after he had been adrogated. But if it was a real loan the fact that there was a *stipulatio* for return, so that it was no longer *mutuum*, was immaterial.

106. *DEPOSITUM*. This was the handing over of a *res mobilis*, to be taken care of, gratuitously. There was a provision of the XII Tables, giving an action for twofold against a deposittee, but this, though it left a trace in the later law, was not matter of contract: the deposittee's default was delict. In the Republic *fiducia* seems to have been utilised in important cases, but was superseded in this application by a praetorian *actio in factum* on failure to return what had simply been handed over for care. At some time, perhaps not before the Empire, such a deposit came to be regarded as creating a civil liability, giving a *bonae fidei iudicium*, formulated *in ius*, and the two *formulae*, *in ius* and *in factum*, continued to

exist, side by side, throughout the classical law. *Condemnatio* under either *formula* involved *infamia*¹, but satisfaction was regarded as vesting the right to the thing deposited in the deposit². The contract was what is called imperfectly bilateral. It primarily bound the deposit², but he might have claims against the depositor, e.g. for expenses. These might be allowed for when the *actio depositi* was brought, and he could hold the *res* till they were provided for (*ius retentionis*). But there was from, at any rate, early in the Empire, an independent action to recover them, the *actio depositi contraria*.

There was no transfer of ownership or of legal *possessio*: that remained with the *depositor*. The *depositarius* was merely a *detentor*. Thus it was not essential that *depositor* be owner: deposit of a third person's property was valid as a contract, and imposed a duty to return to the *depositor*, though of course this was ended if the *res* was claimed in the meantime by the real owner. A deposit² might conceivably re-deposit: it might often be the proper thing to do. Each of the deposits gave rights of action to the parties to it but no further at strict law, though, as we have seen, in later classical law, the original depositor had an *actio utilis depositi* against the second deposit². But a deposit with a man of what was his own was not a valid contract of deposit³.

Deposit² must not use the *res*: this was *furtum (usus)*. He must restore it on demand, with all accessories; but, as he did not benefit, he was liable only for *dolus*, not for negligence (*culpa*), except that gross negligence was put on a level with *dolus*. If he lost the *res* without *dolus*, whether by negligence or not, he was not liable, though recovery of it would restore the old relation. As he had no right in the thing he could not himself recover it from one who took it from him: the owner must proceed. The *depositor*, as he alone benefited, was liable for all expenses, and for any damage due to the *res*, against which he ought to have guarded. He was liable for *culpa*. Three cases of deposit have special rules.

DEPOSITUM MISERABILE (so called). If a deposit was made at a time of crisis, fire, wreck, etc., when there was no time to choose a suitable deposit², the deposit² was liable for double damages

¹ G. 4. 60; Coll. 10. 2. 4.

² D. 41. 4. 3.

³ D. 16. 3. 15.

for denial or *dolus*, a survival of the general rule in the XII Tables. His *heres* was liable for the predecessor's *dolus*, *in simplum*, i.e. not *in duplum*, but only for one year¹, which again suggests delict, since contractual liabilities were usually perpetual.

DEPOSITUM IRREGULARE (so called). This was deposit of money or other "fungible" on the terms that an equivalent was to be returned, so that ownership passed. It was commonly with a banker. Even though deposittee used it, which he might do, it was deposit, though only the intent of parties distinguishes it from *mutuum*. The distinction was important. It was *bonae fidei*, not *stricti iuris*. There was a liability to *infamia*, and the *sc. Macedonianum* and the defence of *non numerata pecunia* had no application².

SEQUESTRATIO was deposit by several jointly of a *res*, usually the subject of dispute, to be returned only when the point was settled and only to the successful party: it was a breach of contract to give it back before, or to the wrong person. It applied to land and moveables, and usually, though not always, the holder (*sequester*) had possessory rights, which would prevent any party to the dispute from acquiring the *res* in the meantime by *usucapio*. There was a special action called the *actio depositi sequestraria*³.

COMMODATUM. Loan for use, the thing itself being returned, *datio ad utendum*. It was always for a fixed time or purpose, on the completion of which the *res* must be returned. At first probably applicable only to moveables, it was extended in classical law to land. Like deposit, it gave only detention, and might be of a third person's property though not of that of the receiver himself. Its history is like that of deposit, a praetorian simplification of *fiducia* with an *actio in factum*, and a later developed formula *in ius* (which may not have appeared till the second century of the Empire), *ius retentionis* and, ultimately, *actio contraria*. But *condemnatio* in the *actio commodati* did not involve *infamia*.

It was essentially gratuitous and, in ordinary cases, for the benefit of the borrower alone. There were cases in which it was for the benefit of both, e.g. where *A* lends *B* objects for decoration of his room where they are giving a joint dinner.

The borrower must return the *res* on completion of the term or purpose, with its accessories. He must take care of it meanwhile, being liable, as it is for his benefit, for any negligence, though it

¹ D. 16. 3. 1.

² C. 4. 30. 14. 1.

³ D. 16. 3. 12. 2.

seems that where it was for the benefit of both he had only to shew the care he did in his own affairs¹. If it was, as it is said it might be, for the benefit of the *commodator* alone, the borrower was liable only for *dolus*. The commodatary was also liable for *custodia*, i.e., he was responsible in any case if it was stolen, but the difficult questions arising out of this liability will be considered later. As he was responsible he could sue the thief, *actio furti*, and the owner could not, till a modification was introduced under Justinian, which we shall consider under the head of Theft. Where he paid damages for the loss of the thing it became his as in deposit².

The lender must allow the agreed enjoyment, refund extraordinary expenses and compensate for damages which he ought to have guarded against, for any *dolus* and for *culpa* where he benefited. As the holder had no rights except under the contract, it was the *commodator* who must (if he was entitled) take the necessary steps for recovery from a third party.

PIGNUS. This was the handing over property to be held as security for debt. This aspect of the matter will be considered in connexion with the general subject of security for debt: here we deal with its contractual aspect. This, like the previous cases, was a simplification of *fiducia*. There were remedies similar to those in the last case, the *actio in factum* (*actio pigneratitia*) with, later, a *formula in ius* (a *bonae fidei iudicium*) perhaps post-classical, and the *actio contraria*. The purpose causes some important differences. The creditor has not mere detention but possessory rights, so that he could get the *res* back from third persons. The debtor could not bring the *actio pigneratitia* so long as there was anything due. Each party was liable for *culpa*, and the debtor was liable if the title was defective, so that the creditor could not keep the *res* against third parties. The creditor might not use it, and any profits received from it went towards the debt, except that by special agreement (*pactum antichresis*) fruits might go in lieu of interest.

107. CONSENSUAL CONTRACTS. These were contracts in which the mere agreement had binding force, a development clearly due to their great commercial importance, for they were the most prominent of all contracts, sale, hire, partnership and mandate. The different consensual contracts have different histories and their

¹ D. 13. 6. 18. pr.

² D. 13. 6. 13. pr.

origins must be considered separately. They break into two groups, sale, hire and *societas*, which are perfectly bilateral and have in each case a *quid pro quo*, consideration contracts, and mandate which is only imperfectly bilateral and is gratuitous. All of them might be conditional, though, as we have seen, there were at one time doubts, at any rate as to those in the first group.

*EMPTIO VENDITIO*¹. Purchase and Sale. This is the most practically important of all contracts: we make such a contract almost every day. It was perfectly bilateral, giving rise to *bonae fidei iudicia*, *actio empti* (or *ex empto*) for the buyer, *venditi* (or *ex vendito*) for the vendor.

The contract as a consensual contract cannot be very ancient, and there are great differences of opinion as to its source. On one view it was merely the express giving of legal sanctions to conventions which had long been commonly observed in practice as an expression of *fides*, with only moral sanctions. On another it was an extension to private relations of the methods of State contracts, the State having always bought and sold, let and hired, without the forms required by private law. On another, it had an earlier phase in which it was a contract *re*, binding only when the *res* was delivered. On another it was a simplification of what had formerly been done by mutual stipulations, one by vendor, one by buyer. There is also difference of opinion as to its time of appearance. Its simplicity suggests a date later than that of the contracts *re*, but there are literary and legal texts which speak of *emptio* and *venditio* before we hear of the contracts *re*. But the word does not necessarily mean the consensual contract as we know it.

As it was purely consensual, no form was needed: consent could be shewn in any way. But to this principle, Justinian, giving legal effect to current practice in the East, introduced an important exception. If the parties had agreed that the bargain should be expressed in writing, there was to be no binding contract till the writing was complete. But the matter was complicated by the practice of giving *arra*, something to bind the bargain, which, while in Roman Law it was only evidence, had another function, at least in small cases, in the East. Forfeiture of it was according to the local customs the penalty for not carrying out the bargain. Justinian provided that, where it was agreed that the contract

¹ G. 3. 139-141; In. 3. 23.

should be written, any party withdrawing before this was done should forfeit his *arra*, or the value of any *arra* he had received. We have the enactment in the Code and an account of it in the *Institutes*¹. Both are obscure and there is at least apparent conflict, and it is doubtful whether purely unwritten bargains were unaffected or whether, even here, a party could withdraw before any performance, without penalty beyond this forfeiture.

Anything capable of transfer could be sold, a physical thing or a right, provided it was such that the vendee could acquire it. Thus a sale to a man of what was already his was void and any price paid in good faith was recoverable. But this did not prevent sale to a man of an outstanding right in a thing which was his, or a conditional sale to him of what was his, to be operative only if it ceased to be his, or a sale to him of what would be his on the occurrence of a condition; what he bought was release from the condition. If the thing sold had ceased to exist when the agreement was made, the bargain was void. Where it had been partially destroyed the general effect of obscure and interpolated texts seems to be that, if the major part still existed, the sale was good subject to allowance². But questions of good faith were material, and the solutions reached are puzzling. Future things might be sold, e.g., "my next year's crop," and a distinction was drawn between sale of a future thing, *venditio rei speratae*, and sale of a chance, *venditio spei*, e.g., "the next cast of my net." In the former case the agreement was void if there was no crop: in the latter case it was good though the net came up empty. If, in the first case, the vendor had prevented the crop from coming, we are told that the buyer had an *actio ex empto*³, though there was no contract, a convenient, but rather illogical decision which recurs not infrequently.

A *hereditas* might be sold, but not of a living person, the reason not being one of principle, for it might well be *emptio rei speratae*, but to discourage speculation in successions. In a sale of a *hereditas*, debts to the *hereditas* and due from it were included. But as *obligatio* was not assignable, it was necessary to make *stipulationes emptae et venditae hereditatis*, the buyer undertaking to pay all debts, the vendor undertaking to hand over all receipts. Where part of a *hereditas* was sold the stipulations would be modified accordingly.

¹ C. 4. 21. 17; In. 3. 23. pr.

² D. 18. 1. 57.

³ D. 18. 4. 1.

A *res incorporalis* might be sold, e.g., a usufruct to be created in favour of the buyer. Though an existing usufruct was inalienable, there was nothing to prevent sale of the enjoyment of it, the vendor remaining technically usufructuary, but bound to permit the buyer to enjoy, the buyer acquiring no *ius in rem*. But even this was not possible for *usus*, which was inalienable in any way¹.

The sale need not be of a specific thing: it might be of an option or of a *genus*, i.e., a thing or quantity of a specific kind. But, so far as the texts shew, the *genus* must be out of something which the vendor had: if it was not out of such an existing mass, it was not, as it seems, a case of sale. On a sale of one of two things the vendor had the choice unless an option in the buyer was expressly created².

We have already dealt with the principle that sale, like all other contracts, might be void for impossibility, and with the relaxations of this principle where, in good faith, freemen were sold as slaves or *solum publicum* or *sacrum* as private. But not only must the *res* be *in commercio*: it must be such that the party had *commercium* in respect of it. A guardian could not buy his ward's property: a provincial governor could not buy land in the province³. There were other prohibitions turning on various principles. Sales of the materials of an existing house were forbidden, as were sale of an actually fugitive slave or of poisons other than recognised medicines. There was nothing to prevent sale of a third person's property: a man may well sell beforehand something he expects to acquire. He might indeed find it impossible to carry out his contract, and for this he would be liable.

108. There must be a price. It must be real, in money and certain, i.e. fixed. It need not be adequate. If it was obviously derisory or not intended to be paid, the transaction was a masked gift and the rules of *donatio*, *l. Cincia*, prohibition between *vir* and *uxor*, and so forth were applicable. From this point of view cases between husband and wife were severely scrutinised. A price too low, though not derisory, made the transaction a *donatio*, as to the difference between price and value. Apart from such cases it was for the parties to make their own bargain. To this rule however

¹ D. 7. 8. 8. pr.

² D. 18. 1. 34. 6.

³ D. 18. 1. 34. 7; 18. 1. 62.

there was in later law the exception known as the rule of *laesio enormis*. If land was sold at less than half value the vendor could refuse performance unless the buyer made up the price to full value. The rule is stated in two *leges* attributed to Diocletian¹ but they shew signs of interpolation, and there is evidence that the rule was not known much later. It is a part of that protection of the poor against the *potentiores* which we have already seen to be a prominent feature of Byzantine law.

The price must be in money, since, if it were goods for goods it would be impossible to say which was vendor and which vendee and their duties were very different. This was the Proculian view, and it prevailed. The Sabinians had held that if the facts made it clear which was vendor and which buyer the rule did not apply. This was not accepted, though, on such facts, it was held, in later law, not that there was sale, but that an action would lie *ad exemplum emptionis actionis*². It was not necessary that the whole price be money: it sufficed that there was a money element in it, for this made the distribution of parts clear.

The price must be certain: an agreement for sale "at a fair price" was no sale. But "*id certum est quod certum reddi potest*": it need not be expressed as a fixed sum of money if what was promised really did amount to such a sum, e.g., "at yesterday's market price," "at the price I gave for the other." And if there was a fixed sum, the addition of a further uncertain element did not vitiate the sale, e.g., "100 and whatever I earn to-day." One case created dispute, a sale "at such price as *T*" (a third person) "may fix." Classical lawyers were divided on the question whether this was a contract. Justinian laid it down that it was a contract conditional on the price being named by the third person, who must be a specified person, not a party³.

It may be added that if a price was agreed on, there was a sale, even though, on principles to be considered later, something else was substituted for the agreed price, *datio in solutum*. On the other hand, if a price was fixed and by a later agreement the price was altered, this was not regarded as a mere pact varying the contract, but as a new contract altogether, replacing the other.

109. OBLIGATIONS OF THE VENDOR. It was a *bonae fidei* transaction giving a benefit to each party. The vendor was liable for *dolus* and

¹ C. 4. 44. 2, 8.

² C. 4. 64. 1.

³ In. 3. 23. 1.

for *culpa*, being bound to take care of the thing till delivery, shewing the care of a *bonus paterfamilias*. He may have been liable for *custodia* in the sense that he was liable in any event if the *res* was stolen, otherwise than by force, a point to be discussed later. Apart from this possibility he was not liable for accidental damage or loss (*casus*) and he was in no case liable for the effects of *vis maior*. Thus, though he was still owner, the risks were not with him and where the loss was in no way imputable to him the buyer had still to pay the price though he got a damaged article or none at all. As this rule looks unfair, it calls for explanation, and has received more than one, the various explanations being of course affected by the views taken by their authors as to the origin of the contract. Most writers treat it as a survival from an earlier state of things in which it was logical. Thus, it has been said to date from the old regime of *mancipatio*, when the contract and the transfer of property occurred together, and, of course, *res perit domino*. The question remains why it survived. It may be mere conservatism, but it seems more probable that in practice it was a commercially convenient rule. It has indeed been suggested that the rule was not classical, but a Byzantine invention. The rule did not apply so long as the contract was conditional, or in a sale of a *genus* by weight, measure or number, till the goods were actually weighed, measured or counted, with the assent of the buyer. Till then the contract was said to be *imperfectus* and the risks were on the vendor¹. But in these sales of a *genus*, if the buyer did not appear on the agreed day or on reasonable notice, the vendor was released from all liability except for *dolus*². But the rule as to risk applied in sale of a specific thing even where it was the property of a third person, unless the vendor had represented himself as the owner. Where the risks were on the buyer the vendor was bound to assign to him any rights of action against third persons to which the facts had given rise.

He must deliver the goods, and, with them, all accessories and all profits which had accrued since the date of the contract, the *commoda rei*. There were difficulties as to what was included in this term, but these we need not consider. One exceptional rule, however, must be stated. If land sold was at the time let, rents received by the vendor for the period after the contract were kept

¹ D. 18. 1. 35. 5, 7.

² D. 18. 6. 1, 2.

by him¹. The rule had no wider application: thus, day to day earnings of a sold slave would be handed over to the buyer.

Delivery means giving unhampered indefeasible possession. To deliver land on which there was an undisclosed usufruct was not such delivery, and though, apart from agreement, the existence of an undisclosed praedial servitude did not amount to failure to satisfy this requirement², this is because such a right was not thought of as part of the land, and thus its existence did not interfere with possession.

Thus, while the vendor was bound to give *vacua possessio* and to guarantee the buyer against eviction, he was not bound to make him owner, though he seems to have been bound to do what in him lay to make him owner. Thus in the case of land he would be bound to mancipate and, if he was owner, the *mancipatio* would transfer ownership. But if he was not owner, so that the *mancipatio* was void, this was not a breach of his agreement, if, nevertheless, he was able to secure that the buyer's enjoyment should not be disturbed. Why the *obligatio* was put in this way is not clear: it may have been in order that the vendor should be spared the trouble of proving title, which might be costly, till it was actually disputed by a third person.

The vendor's obligation to guarantee against eviction has a history which has only in recent years been authoritatively expounded. The XII Tables provided an action (*actio auctoritatis*) by which one who mancipated property for a price had to repay twice the price if he failed to defend the title when it was attacked, by acting as *auctor*, and the buyer was evicted. This has in itself nothing to do with our contract: it is a liability attached by enactment to the transfer of property by *mancipatio*. This remedy remained in existence through the classical age. It did not apply where, either by mere omission or because the thing transferred was a *res nec mancipi*, there was no *mancipatio*. But where the property was of considerable value it was the practice from early times to provide for the same protection by a *stipulatio* for double the price in case of eviction. Where it was of small value, there was a *stipulatio habere licere* which gave a claim merely to an indemnity. In course of time the rule appeared that these promises could be compelled, and, later, but still early in the Empire, at

¹ D. 19. 1. 13. 11.

² D. 18. 1. 59.

latest, that they would be implied, though it still remained usual to make them expressly. Later, but still in earlier classical law, the rule appeared that a buyer was in any case entitled to an indemnity, apart from the implied promise, if he was deprived of the property through a defect in title. The two cases, where double the price was due on *stipulatio*, express or implied and where a simple indemnity was due, have not quite the same rules. In the first case there must have been an actual eviction by force of legal process: voluntary surrender or compromise destroyed the right, as did failure to inform the vendor that a claim had been made¹. And if the eviction involved no loss, e.g. the thing had already ceased to exist, or the winner left the thing with him, there was no claim. Eviction of a part, a physical part or a share, gave a right *pro rata*, but it was usual expressly to stipulate for this.

The indemnity in the other case had no necessary relation to the price: it was for the actual loss, though in later law, it might not exceed double the price. There need have been no eviction, if the title was shewn to be bad, e.g. the buyer still held it, but by another title. And he could sue before the actual eviction occurred². If he had improved the property, he had, besides, or alternative to, his *ius retentionis*, the right to add the amount to the indemnity claimed.

110. The vendor was bound to give a warranty against secret defects, and, here too, there was a long history. By the XII Tables there was an *actio de modo agri*³, if the quantity of land was less than that stated, but there was no remedy for secret defects. The actual concealment of important defects would of course be *dolus*, and gave an *actio doli* when that remedy was introduced, but knowledge of the defects would often be difficult to prove. In the absence of legal requirements, it was the practice, as literary texts shew, to stipulate expressly against secret defects on purchase of slaves or live stock, no doubt before the consensual contract came into existence. As in other cases, the magistrates reinforced existing practice by creating a rule of law. The Curule Aediles, under their authority as regulators of the markets, issued an edict requiring vendors of slaves in open market to declare any serious defects (*morbus* or *vitium*) and if the slave was *fugitivus* or *erro* or

¹ D. 21. 2. 49.

³ P. 2. 17. 4.

² D. 19. 1. 29; P. 2. 17. 8.

subject to any noxal liability¹. The Edict, in this form a measure of police, dictated by the notorious bad character of slave dealers, is at least as old as Cicero. A little later, the Edict went further: it required an express undertaking that no such defects existed, other than those declared, with a general provision against any *dolus*. It gave an *actio redhibitoria* for six months to set the contract aside, if such defects appeared, and an *actio quanti minoris* for damages for a year. There is little doubt that these actions were originally conceived, not as contractual, but as penal, based on a wrong, though, since knowledge need not be proved, the vendor might be quite innocent. The Edict was soon extended to market sales of any live stock, with some variations, e.g., the mental and moral defects did not of course appear².

Under the *actio redhibitoria* the buyer could claim only on restoring the slave or beast, apart from *casus* rendering this impossible. He recovered what he had paid, and, at least in some cases, there was a *condemnatio in duplum*, a fact which emphasises the penal character of the action. The *actio quanti minoris* lay for all defects which would have based an *actio redhibitoria*, and perhaps for minor defects. If there was express warranty, there was a liability for all loss; apart from this and from *dolus*, only for the difference between price and value.

The texts in the Sources are confusing, and there has been interpolation, but the later history of the matter seems to have been somewhat as follows. The Edict was extended first to sales of slaves and cattle, not in open market, and then to all sales of any commodity: we hear of an *actio redhibitoria* for sale of land which proved to be pestilential³. This seems to be classical, and it appears also that, before the end of the classical age, the *ex fide bona* clause in the *actio ex empto* made it possible to recover, in that action, damages for defects which would have based the aedilician actions, and even to compel *redhibitio* itself without using these actions. But, for classical law, there is some doubt about this: it may be that actual *redhibitio* in an *actio ex empto* was then allowed only where the *res* was worthless, the wider rule being only that of Justinian's law.

All this might be varied by express agreement: it was of course

¹ Aulus Gellius *Noctes Atticae*, 4. 2. 1.

² D. 21. 1. 38.

³ D. 21. 1. 49.

possible to bargain for complete exclusion of all these warranties. A sale on such terms seems to have been called *venditio simplaria*¹. But here, as everywhere else, an agreement excluding liability for *dolus* was void.

DUTIES OF THE BUYER. He must make the vendor owner of the price: we have already discussed the rule, of obscure history, that the ownership did not pass even on delivery unless the price was paid or security given or credit agreed for². As the buyer took the *commoda* from the date of the contract, he must pay all expenses incurred in good faith, from that date. He was liable for interest for price overdue, and since, as we have seen, it was possible for the sale to be set aside and the *res* restored to the vendor, he was liable, in that event, for *culpa* in his dealings with the thing.

Neither party could enforce the contract without performing or tendering his part. If he did so attempt to enforce it, he was met by a defence called *exceptio non adimpleti contractus*. This was not really an *exceptio*. The burden of proof of performance was on the plaintiff, and under an *exceptio* this burden is on the defendant.

III. CONDITIONAL SALES. We have already discussed the effect of suspensive (the only real) conditions. The contract existed, so that neither party could withdraw, but was not yet fully operative. To the results of this conception already noted we may add that the buyer could not usucapt *pro emptore* while it was pending, and was not entitled to fruits or other *commoda*³. What are called resolutive conditions have a very different effect. As we saw, they are conditions, not on the contract, but on its *resolutio*: it was to be void if a certain event happened. The contract was *perfectus* and produced all the normal effects. If the condition occurred before anything had been done, no question arose: the contract was as if it had never been. But if one or both parties had acted under it, the goods were delivered or the price paid, the effects *in rem* of these acts would not of themselves be undone, on principle, by the occurrence of the event which avoided the agreement. The normal remedies were *actiones in personam*, by which the buyer could recover what he had paid, and expenses, and the vendor the *res* or its value with damages for imputable deterioration and interim profits. But in one or two of these cases, there are indi-

¹ D. 21. 1. 48. 8.

² *Ante*, §§ 45, 51.

³ D. 18. 6. 8. pr.

cations in the texts that the resolving event produced a certain effect *in rem*, revoking the transfer of property which had occurred, and any rights *in rem* in third parties which had been created by the buyer. The more important of these resolutive pacts must therefore be considered separately. We must bear in mind that what we have to do with are pacts under which the contract was to be void *ab initio* in a certain event. These must be distinguished from agreements under which a contract was to be determined by a certain event, a sort of pact not much found in contracts of sale, but common in other contracts, e.g. a *societas* till a certain event, a lease to determine if war broke out, etc. Here the contract was not annulled *ab initio*: it merely ceased to operate after the agreed event, the rights and liabilities under it which had arisen in the meantime being unaffected.

The chief pacts concerned are:

(a) *Pactum de retrovendendo, emendo*¹, the buyer agreeing to sell the thing back, or the vendor to buy it back, in a certain event, at an agreed price. Here there was no question of any effect *in rem*: when the event occurred there was a remedy *in personam*, an *actio in factum* or, according to some texts, an *actio praescriptis verbis*, an action with which we shall have to deal in connexion with innominate contracts and which may not, here, be classical. The case might, as it seems, have been regarded as a conditional contract of sale, the occurrence of the event being the condition. Indeed one text does so treat it.

(b) *Pactum displicentiae*². An agreement that the thing might be returned if, after trial it proved unsatisfactory. This might be a suspensive condition, i.e., no sale till approval or expiry of the agreed time for approval, but it was usually resolutive. If no time was fixed, rejection must be within sixty *dies utiles*. There was no effect *in rem*: rights created by the buyer in the meantime were good. The remedy was an *actio in factum* or, according to some texts, an *actio ex empto*. The risk does not seem, in effect, to have been on the buyer, so that accidental destruction would not destroy the right to reclaim the price. Somewhat similar is *emptio ad gustum*, for cases where there would be no question of extended trial, but the matter could be decided at once, e.g. on a sale of wine. This, however, was usually suspensive, and the risks both

¹ D. 19. 5. 12.

² In. 3. 23. 4; V. 14.

of destruction and of deterioration, apart from *dolus* or imputable *culpa* of the buyer, were clearly on the vendor.

(c) *Lex commissoria*¹. An agreement that, if the buyer did not perform his part, e.g., pay the price, within a certain time, the vendor might, if he wished, declare the sale void. This was usually resolute and the risks were on the buyer. The vendor must exercise his option promptly and could not afterwards change his mind. The personal remedy was an *actio ex vendito*, but there are texts which give the rescission an effect *in rem*: they give the vendor a *vindicatio* which implies that ownership has reverted. But, elsewhere, this is denied, and the cases in which it is given may, so far as appears, be cases of a suspensive condition and, it must be remembered, the price has not been paid. The better view, though there is no agreement among modern writers, seems to be that even under Justinian there was no effect *in rem*.

(d) *In diem addictio*². An agreement that the vendor might declare the sale void if a better offer was received within a certain time. The condition was usually, though not always, resolute. A better offer does not necessarily mean a higher price, for there might be other factors, but the offer must be better in some way and whether it was so or not was a question of fact. The vendor need not rescind, and could not do so without giving the original buyer an opportunity of mending his offer. The personal remedy was, it seems, an *actio ex vendito*, but many texts give an effect *in rem*. But here, as in the last case, the price would not usually have been paid and the condition might be suspensive, and, in either case, the ownership would not have passed. But in one case the price had been paid and a hypothec created by the buyer is declared to be void on rescission of the contract. This has been explained away, but the texts on the whole suggest that at least in this case, and at least under Justinian, there was a tendency to give an effect *in rem*. There is however much dispute.

It must be remembered that these are only instances, the most prominent in the texts, of the subsidiary agreements which might occur in sales. The contract was purely consensual, and its terms were infinitely variable, as the parties chose: there is hardly a rule among those we have considered which might not be displaced by contrary agreement.

¹ D. 18. 3. 1, 2.

² D. 18. 2.

112. *LOCATIO CONDUCTIO*¹. Letting and hiring. This too was perfectly bilateral, giving *bonae fidei iudicia*, *actio locati* (*ex locato*) and *conducti* (*ex conducto*) for the respective parties, the duties on the two sides being different: hence its double name. The hiring might be of a *res* or of services; hence three types, *locatio rei*, *operarum*, *operis faciendi*, i.e. a specific work to be done. We have already noted early doubt whether there could be conditions.

Locatio rei. Letting a thing for hire. The *locator* is the letter, the *conductor* is the hirer, but the names do not express this point. The *locator* puts the thing at the disposal of the other party. This suggests an early phase in which it was a contract *re* formed by delivery, but all the possible origins suggested for *emptio venditio* have also been suggested for *locatio conductio*.

Though the notion is simple, it was not always quite clear whether the transaction was sale or hire. For Gaius, perpetual leases were hirings, but later law regarded them, under the name *emphyteusis*, as a distinct type of bargain, neither sale nor hire. Where gladiators were let at a fixed sum for those who returned, and a larger sum for those who were killed, Gaius says that this was hire of the first and conditional sale of the second.

There must be consent, a thing let, and an agreed payment (*merces*). Justinian's rule about writing does not apply to this case. The thing let might be land or moveables: as in *commodatum*, it might be a third person's property, and, as we have seen, a usufructuary could let the enjoyment of the subject matter just as he could sell it. There is no trace of application here of rules like those in sale of a *res sacra*; and a prohibition of sale, e.g., of *res dotales*, did not bar letting them: this was often the only way of using them.

The *merces* must be certain and Justinian's texts say that, as in sale, it must be money². But there is not the same difficulty here, and Gaius does not state such a rule. It is possible that it did not exist in classical law and, even under Justinian, some cases cannot be reconciled with the rule. The rent of land might be in produce and even a fraction of the crop. This last conflicts with the rule of Gaius that it must be certain: it is held by some writers that the text is interpolated, by others that the relation was not really *locatio conductio*, but *societas* (partnership). The *merces* was not

¹ G. 3. 142-147; P. 2. 18; In. 3. 24.

² In. 3. 24. 2.

usually a lump sum: more often it was a series of periodical payments. There was the same question as in sale, where the amount was to be fixed by a third party, settled, at least in later law, in the same way.

Obligations of the Lessor. He must give the hirer enjoyment of the *res*, with its accessories, not legal *possessio*, which remained with him, but detention, the hirer having no rights in the thing against third parties, but only under his contract. Thus, if the *locator*, by sale or otherwise, gave *iura in rem* to a third party, the *conductor* had no right against this alienee, who could eject him, the *conductor* having of course a claim under his contract. This unsatisfactory result could be partially guarded against by a provision in the sale that the tenant should not be disturbed. This could not be enforced by the tenant, but he could, by proceeding under his contract, compel the *locator* to take steps. There was normally a fixed term, which in agricultural tenancies was usually five years. It might be renewed (*relocatio*) and if the tenant continued to hold, with consent, this was a tacit *relocatio* for one year. But, in the case of a house, or where there was no fixed term, the holding might then be determined without notice¹. A tenant might sublet (*sublocatio*) but the sublease would end with the principal holding.

The lessor must keep the thing in substantial repair, being liable for *culpa levis*, the most important aspect of which liability was that he must compensate for damage due to defects in the thing of which he knew or should have known. The Edict of the Aediles did not apply, but there was an implied warranty that the thing was fit for the usual purposes of such things. He must pay public charges, taxes, etc., and must repay to the tenant any reasonable expenses incurred *bona fide*, not for the ordinary purposes of cultivation, but for the permanent improvement of the property.

113. Obligations of the hirer. He must deal with the thing like a *bonus paterfamilias*, being liable, as he benefited, for *culpa levis*. He must, in an agricultural tenancy, keep the land in cultivation, as otherwise it deteriorates². He must not alter the character of the property, and, at the end of the term he must restore it, subject to a *ius retentionis* for expenses. He must not dispute his lessor's title, so that, if he claims the thing as his own, he must restore it

¹ D. 19. 2. 13. 11.

² D. 19. 2. 25. 3.

and then vindicate. He was liable to some extent for *culpa* by his slaves, but the texts are unsatisfactory. The dominant classical view seems to have been that whatever delictal (noxal) liability there might be, there was none on the contract, unless he himself had been negligent in choosing slaves for the work, but another view, which prevailed in later law, was that negligence of employees might be claimed for under the contract, but the liability was avoided by surrendering the wrongdoing slave (*pro noxae deditione*¹).

No rent was due for a period in which enjoyment was impossible, from a cause not imputable to the tenant. He could claim a rebate for years in which the crops had failed or been seriously damaged, but if later years proved exceptionally profitable (past years, it seems, were not reckoned) the remitted arrears must be paid. If the tenant was deprived of possession owing to defect of title, the measure of damages varied with the state of knowledge of the *locator*.

The relation was terminable and might end in many ways, e.g.: Expiration of the term, unless there was a *relocatio*.

Renunciation by either party. In the absence of an agreed term this would normally create no liability. Though there was an agreed term, there might be effective renunciation, though it would ordinarily be an actionable breach of the contract. And renunciation by the lessor at an unreasonable time, even if there was no term, would entitle the tenant to claim compensation for expenses of which he had not yet obtained the benefit. It seems that, at least in later law, the lessor of a house could eject the tenant, without liability, if he needed it himself or it was in urgent need of repair². And the tenant might renounce, even if there was a term, without liability if the lessor made enjoyment impossible, or if a third party did so. But here the lessor was under no liability except to transfer any claims he might have against the third party, so far as they were in respect of damage to the tenant, while in the other case he was liable for damages. But to bring these rules into operation there must be a real substantial interruption.

Destruction of the subject matter, with liability for the full *interesse*, if this was imputable to either party.

Forfeiture, if the lessor wished, for gross misuse of the property or for failure to pay rent for two years.

¹ Coll. 12. 7. 9; D. 9. 2. 27. 11.

² C. 4. 65. 3.

Destruction of lessor's title. The case of transfer by him to another has already been considered. The present case is that of a terminable title which came to an end, e.g., where a usufructuary let, and the usufruct was from any cause determined. If the tenant knew the lessor was only a usufructuary, there would be no liabilities; but if the fact had been concealed the usufructuary or his *heres* would be liable under the contract.

114. *Locatio* of services. Not all services could be the subject of this contract: they must be such as *locari solent* which practically means commercial and menial and other "labour" services of everyday life, to the exclusion of what are called "liberal arts," and of some services excluded on other grounds, e.g., those of a *mentor* of land¹, an employment which had religious associations. Usually, though not necessarily, the service was work on some material thing. There were two forms of this contract, *locatio operarum* and *locatio operis*, or *operis faciendi*.

LOCATIO OPERARUM. This was a contract for work of the kind done for a wage, the employer being the *conductor*, the worker the *locator*: he let his services. Both parties were liable for *culpa*, and want of skill to do the work undertaken was *culpa*. If circumstances, not imputable to him, prevented the employee from doing the work, he was nevertheless entitled to his wage, unless he had other work². The wage was held to accrue from day to day, so that if the services of a slave were let, and the slave was alienated, the new owner was entitled to the wage from the date of the sale. As the contract was with the alienator, he alone could sue, but he would be liable to the new owner for the proceeds.

The relation ended by completion of the work, renunciation, impossibility, etc., on principles similar to those in the last case. But while death of a party did not affect *locatio rei*, death of the worker of course ended *locatio operarum*, and death of the employer did so if the service was personal.

LOCATIO OPERIS FACIENDI. This was a contract for a complete piece of work, a job let out, e.g., building a house. In general where the work consisted in the making and delivery of an article, the maker finding the materials, this was not *locatio*, but sale, and *locatio operis* would exist only where the contractor provided none or only part of the materials. But a contract to build a house with the con-

¹ D. 11. 6. 1. pr.

² D. 19. 2. 19. 9.

tractor's materials was *locatio*¹, perhaps because the house was only part of the finished product, merging in fact in the site. In *locatio operis* the *conductor* was the person who undertook the work and received the pay: the word cannot be translated "hirer." The work must be done properly, the parties being liable for *culpa*, and *imperitia* was *culpa*. Similar questions to those in *locatio rei* arose as to *culpa* by workmen: they would arise frequently here, as the work in such cases would not usually be done by the hands of the contractor himself.

The *merces* might be a lump sum or instalments in stages, as the work was approved, this being normally a condition of liability to pay. Approval might, by the agreement, be either of the *locator* or of a third party nominee, and refusal of approval, where this was due, was equivalent to approval. But approval obtained by *dolus* was no approval. The work must be done within the agreed time, or, if none was fixed, a reasonable time, and approved within a reasonable time on demand.

The risk was on the *locator* from the time when approval was or should have been given, in the sense that he must pay, whatever happened to the work. Even if not yet so far advanced that approval could be claimed, the risk was on the employer if the destruction was due to *vis maior* or to a defect in the material or site provided by him. Apart from this, it was on the *conductor*, and the burden of proof that it came within the cases just mentioned was on him.

As the work was not done personally, the contract was not affected by the death of either party. Apart from this the causes of determination were as in the last case.

Two special cases of *locatio* must be mentioned.

*Locatio irregularis*² (so-called by modern commentators), where a task is undertaken and material supplied, but the artificer need not use this but may use other of equal fineness, e.g., a goldsmith is to make a ring, and gold is supplied but he need not use the identical gold; or a carrier receives grain in bulk from different consignors for different consignees, having to deliver the right amount to each consignee, but not the identical grain of each consignor. The risk would seem to be on the goldsmith, as the gold became his but we are not told so. In the carrier's case, apart

¹ D. 19. 2. 22. 2.

² D. 19. 2. 31.

from *culpa*, he was not liable for loss. This would be the natural result if the grain became common to the various consignors, as one would have expected. But the only text makes it the property of the carrier.

Carriage by sea¹. *L. Rhodia de iactu*. By a rule said to be based on the *l. Rhodia*, the maritime law of the Eastern Mediterranean, but differing somewhat from its known rules, if goods were thrown overboard to save the ship, and it was saved, the loss was distributed over all those who had benefited, the owner of the sacrificed goods having a claim against the shipowner, and he, in turn, for their proportion, against the various freighters. Whether an action ever appeared by which the owner of the sacrificed goods could proceed directly against those liable is doubtful.

115. *SOCIETAS*². This was partnership, but differed from modern partnership as it had not necessarily any commercial aim. It was a union of property, skill or labour, or any combination of these, for a common purpose or exploitation. It differed from common ownership, in that there might not be any common capital (e.g. a concert party need have none) but still more in that its aim was an enterprise or exploitation, and the fact of common ownership implies nothing of this kind, though common owners might also be *socii*, and *socii* more often than not were common owners.

Societates were of various types: they are commonly classified as: *Societas omnium bonorum*, i.e. in everything.

Societas omnium bonorum quae ex quaestu veniunt, in all trading matters.

Societas alicuius negotiationis, in all trade of a particular kind.

Societas unius rei (or *negotii*), in a single thing or transaction.

If there was a *societas*, but no evidence of its type, it was presumed to be of the second, a rule which does not necessarily imply that this was the most usual for there commonly would be evidence. The elaborate scheme is of little value, for all except the first are, with a few special exceptions, governed by the same rules; while the first has marked characteristics which will need special discussion. In Gaius and the Institutes, *societates* are classed under two heads, *omnium bonorum* and others.

Every *socius* must contribute something, capital, skill or labour: if he did not he was not a *socius* but a donee. Every *socius* must be

¹ P. 2. 7; D. 14. 2.

² G. 3. 148-154; In. 3. 24.

accepted by all the others: a *socius* could not introduce a new member to the *societas*. If he purported to do so, he was responsible for what was done by the person so introduced¹. No form was needed, and, early doubts apart, there might be conditions. The contract was perfectly bilateral, giving a *bonae fidei iudicium* (*actio pro socio*), the duties of all parties being the same. There was an element of *fraternitas* in it, which, as we shall see, affected the rules.

Apart from contrary evidence, shares were equal. But they need not be: they might be agreed *ab initio* or left to be settled by an arbitrator (an unfair allocation being subject to judicial correction) and one result of the *fraternitas* was that the arbitrator might be one of the *socii*². It might be agreed that a man's share in the profits should differ from his share in the loss, and, though a *socius* could not be wholly excluded from profit (*societas leonina*), for this would be *donatio* by him, he might be wholly excluded from loss. His cooperation might be worth getting even on these terms. Where a man's share of profit differed from that of loss, it would be material to determine, in enduring concerns, how often the balance was struck. It is usually held that, while there would be interim drawings, there would be one final adjustment at the end of the *societas*. Where it was for a single transaction, or short term, the difficulty would not arise.

Obligations of the *socii*. They must contribute their agreed share of the capital. Where it was money, the ownership would be common. Where it was fixed capital, land, buildings, etc., this might be so, or the *societas* might have only the use: we are not well informed as to the incidence of risks in this case. Apart from agreement, the administration was shared, but this might be left to one or more *socii*, or even to a manager who was not a *socius*. *Socii* were liable for *culpa* (*culpa levis*, failure to shew the care of a *bonus paterfamilias*), though, as we shall see, some texts require only the care the *socius* shews in his own affairs, the so-called *culpa levis in concreto*. As a result of the *fraternitas*, they were liable personally for the negligence of those employed by them in the affairs of the *societas*. Any *socius* might veto any administrative act of another, subject to liability in the *actio pro socio*, if the veto was fraudulent or unreasonable. One fundamental difference between *societas* and modern partnership must be emphasised. *Obligatio*

¹ D. 17. 2. 19.

² D. 17. 2. 6.

was essentially personal, and, apart from special authorisation (mandate), a contract in firm affairs by one *socius* created no obligation as between the other contracting party and the other *socii*. His remedy was solely against the *socius* with whom he had contracted. No *socius* could alienate more than his own share without authorisation, which might be tacit¹. Conversely a *socius* must account for all receipts in firm business and could claim contribution for payments made therein. There were, however, modifications of this extreme individualism. We shall meet *societates* in which all were liable on the contracts of any. A mandate of all to one was common, and here the mandating *socii* were liable to an *actio utilis*, and to the *actiones institoria* and *exercitoria*.

116. End of *societas*. There is a fundamental rule that what ended the *societas* as to one *socius* ended it altogether². The membership of any one *socius* might be the reason which had led another to join. The rule does not however mean that the business necessarily or even usually came to an end. It was quite open to the other *socii* to agree to go on, taking another *socius* if they thought fit. What it means is that there would have to be a settlement of accounts, and, if the affair went on, the retiring *socius* or his representatives had no concern with later transactions.

Apart from the obvious cases of completion of purpose or term, occurrence of condition, and destruction of subject matter, a *societas* was ended by

Death of a *socius*, known to the others. *Societas* was so personal a relation that an agreement *ab initio* that the *heres* of a *socius* should replace him in the *societas* was void³. He would inherit the rights and liabilities of the deceased, as to the past, and thus might be a party to the *actio pro socio*, and he must complete transactions half done, shewing the care of a *socius*. But unless he is admitted to a new *societas* to continue the business he has no concern with future transactions.

Renunciation. The *societas* might of course end by mutual consent, but, apart from this, any *socius* might at any time end it, by renunciation, even where the *societas* was for a term or even *perpetua*, i.e., lifelong. But this, though it would end the firm could not always be done with impunity: in some cases the renouncing *socius* would be liable for any resulting loss to the other *socii*.

¹ D. 17. 2. 44.

² D. 17. 2. 65. 9.

³ D. 17. 2. 35.

"*Liberat socios a se, sed non se a sociis*¹." This would be so, if it was done fraudulently, to secure for himself an impending profit or avoid an impending loss, or if, apart from fraud, he did it at a time when it meant disaster to the concern. If it was in defiance of agreement, e.g., if there was a term or an agreement not to renounce, it seems that he would in any case be liable for damages, if his act compelled the stoppage of the business. But inevitable long absence on public affairs, or gross misconduct of a fellow *socius* justified renunciation in any case. Renunciation might be express or tacit, e.g., alienation by him of his share in the assets.

Capitis deminutio or *amissio bonorum*². In the time of Gaius any *capitis deminutio* ended the *societas*: under Justinian, only *maxima* or *media*. At that time therefore *capitis deminutio* was unimportant in this connexion, since any *amissio bonorum*, e.g. bankruptcy, ended the *societas* whether there was a *capitis deminutio* or not, and loss of property was a usual accompaniment of *capitis deminutio*. But *deportatio* of a *socius* was a *capitis deminutio* and ended the *societas*, even though, as sometimes happened, he was allowed to keep some of his property.

Actio pro socio. This action, for contribution *inter socios*, normally ended the *societas* though it might be brought as a friendly suit to settle a particular point without producing this effect³. It was a *bonae fidei iudicium*, and was one of the cases in which there was the privilege which has acquired the non-Roman name of *beneficium competentiae*: a defendant was not condemned beyond what he could pay, unless he had fraudulently made himself insolvent. The rule seems at one time to have applied only to *societas omnium bonorum*, and never applied to a *heres* of the *socius*. What was unpaid was still due, security being taken for it. On the other hand, *condemnatio* in the *actio pro socio* involved *infamia*, perhaps only where there was *dolus* and not where a *heres* was sued only as such. Where there was common property, as there usually would be, there was also the *iudicium communi dividundo* for division. The characteristics of this proceeding will be considered later: here it is enough to say that under Justinian it did not necessarily end the *societas*, though it usually did.

There were some types of *societas* with special rules.

¹ D. 17. 2. 65. 4°.

² D. 17. 2. 4. 1.

³ D. 17. 2. 65. 15.

Societates venalicioꝝ. We have seen that the untrustworthiness of slave dealers led to the introduction of the aedilician actions for defects. There was a further rule that, if one of *socii* sold, the aedilician actions lay in full against any *socius* having a share not less than that of any other member of the *societas*¹.

Societates argentarioꝝ. Banking firms, through whom most important business was done. A contract *literis* by one of them bound all in full, and any contract by them all bound each in full, and not merely *pro rata*, whatever was intended².

Societates vectigales, i.e. for tax-farming, similar rules being applied to concerns contracting with the State for exploiting mines, quarries, etc., the general name being *societates publicanoꝝ*. The main special rules were (a) death of a *socius* did not end the firm, unless he was the manager or the actual contractor with the State (*manceps*): the contract and the concern were usually for five years. (b) It might be agreed *ab initio* that the *heres* of a deceased *socius* should take his place, and, even without such agreement he took his share of rights and liabilities for the rest of the term though he had no share in management. (c) There is evidence that these *societates* were or might be corporate, the rights, etc. vesting not in the *socii* as individuals, but in the *societas*, conceived of as a unit. But there is much difference of opinion as to the meaning of the texts.

Societas omnium bonoꝝ, i.e. in all property and undertakings. This is no doubt the oldest form of *societas*, itself modelled on the ancient practice of joint *heredes* to hold and administer the estate in common (*consortium*). It may be that the other forms are derived from it, but this is uncertain. Rules applied in the texts to all *societates*, notably the *beneficium competentiae*, were long applied only to this case. The *societas* did not necessarily cover all future acquisitions: it might, like the old *consortium*, be confined to present assets, and it might be agreed to include some, but not all³, future acquisitions. It was not corporate. It had the remarkable rule that the mere agreement vested in all the *socii*, in common, all the property belonging to any of them, there being special rules for cases where the ownership was limited in some way, e.g. *dos*, or inalienable, e.g. usufruct. Future acquisitions, where these were included, needed actual transfer.

¹ D. 21. 1. 44. 1.

² D. 2. 14. 9. pr.; *ad Herenn.* 2. 13. 19.

³ See D. 17. 2. 3. 2.

As the property belonged to the *socii* in common, they were responsible for all expenses, i.e., these were a common charge on the capital as a whole, though of course they could not be sued directly by creditors of a *socius*. But property wrongfully obtained did not vest in them, and conversely, they were not responsible for delictal debts and the like. The individual *socius* must pay these out of his share of the revenues, which were no doubt divided. If he did not, the creditor could make him bankrupt, which would end the *societas*, so that his share of the capital would be available.

117. *MANDATUM*¹. The undertaking of an act by one person at the request or authorisation of another (*mandator*), the person undertaking the act being usually called, though not in Roman texts, *mandatarius*. It might be an act or series of acts of any kind, and it commonly, but not necessarily, involved entering into legal relations with a third party. It gave a *bonae fidei iudicium*, *actio mandati*. It seems to have been known very soon after the *l. Aebutia*. Originally a mere request to do a friendly act, it became steadily more important and more commercialised. It plays a part in many relations remote, at first sight, from the contract itself. The *procurator*, a name which at first meant a manager of one's affairs, or of a branch of them, but later was also applied to a representative for one purpose only, acted under mandate. *Adstipulator*, surety, representative in litigation, were all mandataries. *Mandatum* was gratuitous, though in classical law it was allowed to recover an *honorarium* which had been agreed on, but only by a separate *cognitio* before the magistrate: its non-payment was immaterial in the *actio mandati* itself. It might be conditional or *ex die*, and it had no necessary form, except indeed in the appointment of the most formal representative in litigation, the *cognitor*. It might even be tacit.

The *mandator* had no *actio mandati* unless he had an *interesse*. There was an elaborate classification of mandates according as they were in the interest of *mandator*, *mandatary*, a third party, or any combination of these. But a mandate in the interest of the *mandatary* alone was a nullity: it was mere advice, unless, we are told, the thing done was one which would certainly not have been done, but for the mandate², a limitation no doubt due to Justinian. On the general result of rather confusing texts it seems that an

¹ G. 3. 155-162; In. 3. 26.

² D. 17. 1. 6. 5.

actio mandati against the *mandator* would lie in any case but that just mentioned, even if it was in the interest of a third party alone. And much ingenuity was applied to finding an *interesse* in the *mandator*.

The authority of the mandatary might vary: it was a question of the terms of the agreement. But what he undertook he must carry out. He was not entitled to profit, and must therefore account for and transfer all proceeds. As he did not profit, he was liable in early classical law for *dolus* only, but in later law he was liable for *culpa*, perhaps on account of the confidential nature of the relation, or, more probably, because the existence of *honoraria* made its gratuitous nature unreal. He must follow his instructions: if he exceeded them, in a divisible matter, e.g. if he bought at, or became surety for, a larger sum than was authorised, or sold for a less, there was dispute as to the result. The Sabinians gave him no claim at all. The Proculians allowed a claim up to his instructions, he himself bearing the rest, and this view prevailed. He was liable not only for misfeasance but also for nonfeasance. Subject to a restricted right of renunciation, he was liable for damages resulting from his failure to do what he undertook. *Condemnatio* in the *actio mandati* involved *infamia*, at any rate if there was *dolus*. The *mandator*, also liable for *culpa*, must take over rights acquired, indemnify for liabilities incurred, and repay expenses directly concerned with the purpose of the mandate, but not accidental loss, not reasonably incident to it, though it would not have occurred but for the mandate¹.

Determination of mandate. Apart from completion, impossibility, condition, expiry of term, mutual waiver, and so forth, mandate might end by

Revocation or Renunciation. *Mandator* might revoke the powers at any time, but if anything had been done under the mandate, he must take over rights and liabilities created before the mandatary had notice of the revocation. The mandatary could renounce, if nothing had been done, provided this did not practically interfere with the principal's power of getting the thing done at all, not, e.g., if, relying on the mandatary, he had started on a journey, and thus could not take steps to find a substitute. Illness of mandatary, hostile interest, or insolvency of *mandator* justified renunciation

¹ D. 17. 1. 26. 6.

at any time¹. Apart from such cases, though the renunciation would end the mandate, he would be liable for resulting damage, especially for leaving things half completed.

Death of either party. As a personal relation, it ended by death of either party, with rules as to notice in case of death of *mandator*, and as to completion of unfinished work in case of death of mandatary, similar to those in a normal *societas*. It is clear that a mandate for performance after death of mandatary was simply void. The case is not so clear for that of *mandator*. Gaius, who lays down the rule for the case of death of mandatary, does not for the other case: no classical text does so. But the Digest does, on the principles that mandate is ended by death, and that an *obligatio* cannot begin in the *heres*. But it gives instances of such mandates which were valid, of which the usual explanation is that they were valid if the facts were such that an action might arise during the life, an explanation suggested by the texts. This does not take account of the rule that mandate was ended by death. It is generally held that this relaxation is due to Justinian, but this is far from certain, in view of the fact that Gaius mentions one case and not the other.

118. Two or three applications of mandate were of such importance as to require special attention.

Mandate as agency. An agent is one who sets up legal relations between his principal and a third party, himself acquiring no right and incurring no liability. The personal nature of *obligatio* in Roman Law was inconsistent with this conception, but some approach to it was made in connexion with mandate. The Praetor allowed an action against one who had set up a man to manage a business, or a trading ship, *actio institoria*, *exercitoria*, and later classical law allowed an extended form of this action, *actio ad exemplum institoriae*, even in cases of isolated mandate². But the *mandator* could not sue on the mandatary's contract, and the mandatary was liable and entitled under it. His right of action could practically be assigned to his principal, but that is a different matter. We are told however of some urgent cases in which the principal could bring the mandatary's action, as an *actio utilis*, e.g. where the mandatary was insolvent³. There was, however, no general rule transferring the action. The *mandator* could claim to have it

¹ P. 2. 15. 1; D. 17. 1. 23.

² D. 14. 3. 19. pr.

³ D. 14. 3. 1, 2.

transferred, but the view formerly held that, where he was entitled to a transfer, an *actio utilis* lay without transfer, is now discredited.

Mandate as surety. We have seen that mandate underlies most forms of surety, but the present point is that mandate itself might act as a contract of surety. A *mandator* was bound to indemnify his mandatary. If therefore, *A* gave *B* a mandate to lend to *C* and *C* failed to pay, *A* would have to do so and was thus, in effect, surety to *B* for *C*. From the fact that the mandate was an independent contract, and that the duty was not exactly to pay, but to indemnify, differences in the rules resulted which will be considered in the general treatment of security for debt¹.

Mandate as assignment of contract. *Obligatio* could not be directly assigned, but a similar result could be arrived at by giving the person to whom it was desired to assign, a mandate to sue on behalf of the person entitled, to act as his *procurator ad litem*, with an understanding that he was not to account for the proceeds; he was, as it is put, *procurator in rem suam*. This was a defective system, as the debtor could still free himself by paying the assignor, and until action was brought, the *mandator* could revoke. And it was *ipso facto* revoked by death of either party. But the system was gradually improved. If it was revoked by death, classical law gave the assignee an *actio utilis* in his own name, and the same rule was reached later, perhaps not till Justinian, where there was express revocation. And the rule appeared, but was probably not general till the time of Justinian, that if notice was given to the debtor, or he had paid part of the debt to the assignee, the assignor could no longer sue, or receive payment so as to release the debtor².

It will be seen that there are many respects in which mandate resembles contracts *re* rather than *consensu*. There seems never to have been any doubt about the possibility of conditions, as in the other consensual contracts. They all had consideration, but mandate, like the contracts *re*, was gratuitous. They were perfectly bilateral: mandate, like deposit, *commodatum* and pledge, was at least under Justinian imperfectly bilateral, giving an *actio contraria* to one party, though it is now widely held that in classical law the action on either side was the *actio mandati*. And the power of withdrawal seems inconsistent with the binding force of mere consent. It has therefore been suggested that it should properly be treated as a contract *re*. But it differs from them, fundamentally,

¹ *Post*, § 145.

² C. 8. 41. 3.

in that it does not rest on delivery of a chattel. It is properly classed as consensual, since the mere agreement created an *obligatio*. If one who had accepted a mandate simply neglected it, he was liable, under his contract, for resulting loss. The right of renunciation does not affect the matter: indeed that right implies that the *obligatio* to be renounced already exists. *Societas* gave a similar right of renunciation, and arrangements for a right of withdrawal were common in sale. Consideration is not the basis of the consensual contracts: it is only one of the factors which led to their commercial importance and consequent recognition.

119. INNOMINATE CONTRACTS¹. These contracts, though sometimes regarded as an analogous extension of the principle of the contracts *re*, have but little resemblance to these. They represent a much more modern looking idea, the principle that where there is an agreement for mutual services, however informal, this is a valid contract so soon as one party has done his share. The essence seems to be the *quid pro quo* and the part performance. The services might be of any kind, acts, forbearances or transfer of rights, and the accepted classification of them, from the Digest, is under four heads, *do ut des*, *do ut facias*, *facio ut des*, *facio ut facias*, a classification which however says nothing of the very possible case of agreed abstention (e.g. *do ne facias*). The history, much controverted, seems to be, in the main, somewhat as follows. Cases might occur (we have seen some), in which, while it was clear that there was one of the known contracts, it was less clear which it was. Sometimes the point was settled and action on the proper contract given. In other cases, a formula was used which set out the facts and followed the statement by an allegation of a legal duty, an *actio* with *praescripta verba*. This exceptional class of cases had nothing to do with innominate contracts, but the civil action in which one used these *praescripta verba* was the germ of the *actio praescriptis verbis*, as a general type, found in the later law. Where the transaction, though analogous to existing contracts, was not really within any of them this remedy was not available in classical law, for it was not possible to allege that there was a civil *obligatio*. There might be an *actio doli*, or, where a right had been transferred, on the faith of an undertaking which the other party had failed to carry out, a *condictio* for recovery. But this was far short of enforcement: it was undoing the transaction, while enforcement

¹ D. 19. 5.

means putting the injured party, so far as possible, in the position in which he would have been had the agreement been carried out. In the second century, and perhaps earlier, an *actio in factum* was given, by which damages could be got for non-fulfilment, and by the end of the classical age, this seems to have applied to all cases. But in one case at least, there was a civil action: the plaintiff might sue *praescriptis verbis*, though it is not quite clear that the case is in point, as the action given had a special name, *actio de aestimato* (or *aestimatoria*), and the case seems rather to be contemplated as one of those in which it was certain that there was a recognised contract, but uncertain which it was. However this may be, this case, which was set out in the Edict, set a fashion. An action in this form was allowed in classical and later law in an increasing number of cases, and in Byzantine law it was the general remedy in all cases of this type, recognised as a general type of action, the *actio praescriptis verbis*, a *bonae fidei* proceeding. It appears under many other names, *actio civilis incerti*, *actio civilis in factum*, *actio praescriptis verbis in factum*, etc. It is not certain which of these names may be classical, and some of them are confusing, as the great point of the action was that it was not formulated *in factum* but *in ius*.

The most prominent of the innominate contracts discussed are: *Aestimatum*¹. (Subject to what has been said above.) This was an agreement under which articles were handed over by one man to another, e.g. a pedlar, on the terms that he was to restore them or an agreed price, usually within a fixed time. The terms might vary: he might agree to pay a price for those he got rid of, varying with the price he got, or varying according to the number he disposed of. This had close affinities with conditional sale, mandate, *locatio operarum* and even *societas*, the affinity being more or less close according to the detailed terms. Ownership did not pass to the pedlar on delivery, but presumably did if the goods were sold or the time expired. The rules as to risk are not clear, but on the whole the risks seem to be with whichever initiated the transaction, and, if this was not clear, with the supplier of the goods, the holder being liable for *culpa*. The action was a *iudicium bonae fidei*, the *actio aestimatoria*, or *de aestimato*.

Permutatio. Barter, Exchange². Of this contract we know little except for the time of Justinian. It became binding by actual

¹ D. 19. 3. 1. 9.

² D. 19. 4. 1. 3.

transfer of ownership by one party, and thereupon the risk in the *res* undelivered passed to him, though he was not yet owner, as in sale, the holder being liable for *culpa*. The *actio praescriptis verbis* lay where one had performed (alternatively to a *condictio* for recovery) if the other failed to deliver or gave only a defective title. The law as to concealed defects was also as in sale. But where one party only had delivered, but had not made a good title, there was no question of the *actio praescriptis verbis*, since there was as yet no contract, but there would be a *condictio* for recovery.

Transactio. Compromise of a pending dispute, abandonment of a claim or defence for a *quid pro quo*. If a formal release of the claim was given the claim was destroyed: if an informal, there was an *exceptio pacti*. If it was a defence which was abandoned the action would proceed to judgment. If the *quid pro quo* had been formally promised, there would be an action on that promise. But if it was only an informal promise, classical law gave only an *actio doli*, but in later law the *actio praescriptis verbis* lay¹.

*Precarium*². This was a grant of property to hold and enjoy at the pleasure of the grantor. It originated in grants of this character by patrons to freedmen and *clientes*, but became a general institution at latest early in the Empire. It was gratuitous and immediately revocable even if a term had been stated. It had commercial importance: a creditor who had received a thing *in fiducia* sometimes allowed the debtor to hold the thing *in precario*, and an unpaid vendor might so allow the buyer to hold it. It might be of anything, but was most commonly of land. In classical law it ceased on the death of the holder: under Justinian it continued, and the *heres* was liable, *de precario*. The *precario tenens* enjoyed the fruits and usually, but not always, had legal *possessio*. He was liable for *dolus*, but not for *culpa* until the owner sought to recover by the appropriate remedy, the interdict *de precario*, which ended the *precarium* and made the holder liable for *culpa* and responsible for unconsumed fruits. There was of course a *vindicatio*, or, if it had, imputably, ceased to exist, a *condictio*. There was no other civil remedy in classical law, but under Justinian there was an *actio praescriptis verbis*. For this reason it is commonly treated as an innominate contract, though it differs from the others in that usually it is without the mutual element.

¹ C. 2. 4. 6.² D. 43. 26.

CHAPTER XIV

THINGS. OBLIGATIONS. PACTS. AGENCY. QUASI- CONTRACT. DELICT. QUASI-DELICT

120. In the two immediately preceding chapters dealing with contracts we have had occasion, here and there, to notice some rules of the *ius honorarium* applicable to them, but they are all institutions of the *ius civile*, in the sense that they gave an *actio in ius*, an action alleging a civil *obligatio*. Thus the name "contract," even in Justinian's law, still expresses what we spoke of as the early classical view of *obligatio*: it was a civil law notion. But this does not mean that agreements not provided with this civil protection were without any force. Formless agreements, *pacta conventa*, *conventiones*, have a long history in the law, of which we must trace an outline.

The XII Tables contain several rules about *pacta*, but we need consider only the provisions that a pact not to sue was a defence at civil law to an action for *membri ruptio*, and that it was permissible to come to terms, by pact, in a case of *furtum*, with, presumably, the same civil effect¹. The rule that pact was a complete defence may have covered all delicts: in any case it did so in later law: *pactum de non petendo* was a full civil defence to any action on delict. The Praetor applied the same principle in a wider field: he allowed such a pact to be pleaded as a defence in any action, by the *exceptio pacti*. The obligation still existed at civil law, but was paralysed by this defence.

Besides destroying an *obligatio*, a pact might vary it, and *pacta* added to contracts (*pacta adiecta*) modified the obligation in degrees varying with the nature of the contract and with the circumstances in which the pact was made. It might be made either at the same time as the contract (*continuum*, *in continenti factum*) or after an interval (*ex intervallo*). In informal contracts, including *mutuum*, a *pactum continuum* was a part of the contract enforceable by either party in an action on it. In *stipulatio* it could be used as a defence, i.e., where it was *ad minuendam obligationem*, but it is not so clear that in classical law it could be used by the plaintiff, i.e., where it was *ad augendam obligationem*, though it certainly could in later

¹ XII T. 8. 2; Girard, *Textes* (5), 17; D. 2. 14. 7. 14.

law. So far as the texts shew, *pacta ex intervallo* were available only as a defence, except in consensual contracts. In these, any such pact, if it altered essentials, e.g., the price, was treated as creating a new contract, and waiving the old, though one on a detail, e.g., altering the date of payment, was good only as a defence¹. It is however held by some writers that the rule allowing *pacta ex intervallo* to be used only in defence was a restriction not known to the classical law. It is to be noted that these rules as to *pacta adiecta* are not praetorian: they were created by the jurists and the practice of the courts.

121. A further development is praetorian. The Praetor gave an *actio in factum* on certain pacts (*pacta praetoria*) and later law introduced others. To these pacts, as being clothed with an action (as opposed to *pacta nuda*) the medieval lawyers gave the name *pacta vestita*. The chief *pacta praetoria* were:

Iusiurandum voluntarium. Any party to a dispute, in litigation or not, could offer, or offer to take, an oath as to the truth of his claim or defence. If the other party chose to take the oath, or allow it to be taken, the party who had taken it had an *exceptio iurisiurandi* if he was sued on the claim, or, if he was the claimant, could bring an *actio iurisiurandi*, in which all he had to prove was the offer and the oath and its content: the merits could no longer be considered².

Constitutum. *Pactum de constituto*³. An informal undertaking to pay an existing debt at a fixed time. It gave an *actio in factum* (*de pecunia constituta*). Its primary purpose seems to have been to stave off immediate proceedings and, like many other praetorian actions which we find in later law as purely contractual or quasi-contractual, it had a certain penal character. The plaintiff could require a penal *sponsio* of half the amount in dispute, to be added to the amount. But this had disappeared in later law. If the old debt was conditional, the *constitutum* was under the same condition. The source of the old debt was immaterial. At first the debt had to be of money, but this rule, gradually relaxed, had quite disappeared under Justinian. The *constitutum* might be for less than the debt, but was void for any excess over it. It was void if there was no real debt, but a *naturalis obligatio* sufficed. In some cases, like most praetorian penal actions, it was *annua*, i.e., the action must be brought within a year, but under Justinian it was *perpetua*.

¹ D. 18. 1. 72. pr.

² D. 12. 2. 9.

³ In. 4. 6. 8, 9.

Though a fixed time seems essential, it was not void if none was stated, but was enforceable at once till Justinian required ten days' delay. It does not seem to have destroyed the old debt, unless this was expressed, in which case it gave an *exceptio*.

The case we have considered is that of *constitutum* by the debtor, but it was possible to make such a promise on another's debt (*constitutum alieni debiti*). Here it was essentially suretyship, and its characteristics will be considered under that head.

Hypothec. Pactum hypothecae. This was an agreement by which a pledge over property was established with no actual transfer. We shall discuss it in the general treatment of security for debt. The action which it gave is known in the time of Justinian and perhaps in classical law as the *actio hypothecaria*, but this was not an action to enforce the obligational side of the matter, but an *actio in factum* to recover possession from anyone who held it. And though it was legally on the same footing as *pignus*, there was no occasion for the *actio pigneraticia* or the *actio contraria*, since the possession was not actually transferred to the creditor.

Receptum argentarii. This was similar to *constitutum*, a promise by an *argentarius* to pay his customer's debt. It gave an *actio in factum* (*receptitia*). It had no penal *sponsio*. It always applied to any kind of debt, and it seems to have been immaterial that the original debt was unreal. Justinian abolished it, fusing it with *constitutum*, which had acquired most of its characteristics¹.

Receptum nautae, cauponis, stabularii. Where the goods had been received with a special agreement, *res salvas fore*, the *nauta*, etc. were liable in any event if the goods were stolen or lost. The *actio* was *in factum*.

Receptum arbitri. Where parties agreed on an arbitrator who agreed to act, he would be compelled to do so apart from certain excuses. But there was no action: the Praetor used administrative measures, fines, etc.

Pacta legitima. In the Byzantine Empire some pacts were made binding by imperial authority. As they were enforced by civil actions there was no reason, except conservative adherence to the classical scheme, why they should not have been called contracts. In A.D. 438 Theodosius made an informal agreement to give a *dos* binding (*pactum dotis*) and Justinian gave similar force to a pact

¹ C. 4. 18. 2.

to make a *donatio* (*pactum donationis*¹). It is noticeable that in all the other actionable pacts there was a *quid pro quo*. The agreement to refer a question to arbitration (*compromissum*) may also be regarded as a *pactum legitimum*. Whether the agreement was formal or informal, the decision was without direct effect on the rights of the parties in classical law, but it was usual to secure its efficacy by a promise of penalties if it was not obeyed. But, under Justinian, the decision of an arbitrator, even informally appointed, was binding if accepted in writing or not expressly rejected within ten days. It could then be sued on by what Justinian calls an *actio in factum*, an expression with little meaning in his day.

122. AGENCY IN CONTRACT. The personal nature of *obligatio* excluded for Roman Law any full development of agency as already defined. But something of the sort was essential to trade on a considerable scale, and was gradually reached. It was at the best very imperfect and it may be doubted whether the Romans thought of it in terms of "representation" at all. We have seen that all contractual and other "patrimonial" rights, acquired by subordinate members of a *familia*, vested in the *paterfamilias*, but this in no way rests on authorisation: it is in fact only an expression of the notion, not that they represent the *paterfamilias*, which would make him liable also, but that, in a sense, they are his, so that what they acquire is his. The Praetor went further and created liabilities on the contracts of members of the *familia*, in degrees varying with the facts. By the *actio de peculio et in rem verso*², the *paterfamilias* was liable on their contracts to the extent of the *peculium* and any profit he had received, any debts due from the *peculium* to him or any other member of the *familia* being deducted, and any debts due from anybody to the *peculium* being added, as well as anything which the *paterfamilias* had fraudulently removed from the *peculium*. If the contracting party passed out of the *familia*, leaving the *peculium*, the liability continued for a year. All this did not rest on authorisation, and did not exclude liability in the actual contracting party. For a *filiusfamilias* was liable on his contract, though this was unimportant until he became *sui iuris*, and even a slave incurred a *naturalis obligatio*.

By the *actio tributoria*³, if a *filius* or slave traded with the *peculium* or part of it to the knowledge of the *paterfamilias*, the latter was

¹ In. 2. 7. 2.

² D. 15. 1; In. 4. 7. 4.

³ G. 4. 72; In. 4. 7. 3.

liable so far as the part of the *peculium* so used would go, with no such right of deduction as existed in the *actio de peculio*: it would be for the creditor to choose which action was the better. The process was that the *paterfamilias* would be called on to distribute the fund *pro rata* among the creditors, including himself, a sort of bankruptcy of the subordinate, with the *paterfamilias* as administrator. It was only if he failed to do this properly that the actual action lay. It was *perpetua* and was not affected by the death of the slave.

By the *actio quod iussu*¹ the *paterfamilias* was liable in full on any transaction which he had authorised. Whether the authorisation must be known to the other party is not clear: as it was an inducement to contract it commonly would be. As this action rests on authority it looks more like agency, but it was confined to the *familia* and, like the other actions, did not exclude liability in the son or slave who contracted.

These rules are not stated to apply to a wife *in manu* or to a person *in mancipio*, and we are not really informed as to their position.

Further praetorian institutions, outside the family, bring us nearer the conception of true agency.

*Actio institoria*². Where a man employed another, whether a member of the *familia* or not, to manage a business (*institor*) he was fully liable on contracts made by the *institor* in connexion with the business. The action was *perpetua* and available both to and against *heredes*. It was barred if notice not to contract had been given, specially, or by suitable written public notice at the place of business. It did not lie unless the contract was strictly in connexion with the business (often difficult to decide) and the third party knew that it was. Whether he need have known that the person who authorised was the present defendant is disputed.

*Actio exercitoria*³. An action on similar principles where a man is put by a principal (*exercitor*) in command of a trading ship (*magister navis*): it is noticeable that here the action is called after the principal and not, as in the last case, after the intermediary.

These cases differ from true agency in that, in general, the employer did not acquire rights under the contracts of an extraneous *magister* or *institor*. These remained with him (or his owner if he

¹ G. 4. 70; In. 4. 7. 1.

² G. 4. 71; In. 4. 7. 2.

³ *Ibid.*

was a *servus alienus*) and the *magister* or *institor* was also personally liable.

The further stage reached in mandate has already been explained.

123. QUASI-CONTRACT¹. No exact definition of this class of obligations is possible, but they may be roughly described as those which are not based either on a binding agreement or on a wrong, a delict or the like. It seems that in classical law, when "contract" had come to mean civilly actionable agreement, the present heterogeneous mass of obligations was grouped, with perhaps some others, as *ex variis causarum figuris*, a plan which renounces any attempt at a positive description. The instances given by Justinian in the Institutes are all civil, though in his time the notion of *obligatio* covered praetorian claims. But this would cover a large number of cases, some of which had originally been thought of as penal, but were quasi-contractual in his day. And there are civil cases which he does not mention. The most important quasi-contracts are the following:

*Negotiorum gestio*². This is attending to a matter which really concerns another, without authority. There was a *bonae fidei iudicium* (*negotiorum gestorum*) against the *gestor*, and an *actio contraria* for reimbursement of expense. Here, as elsewhere, there was an earlier *formula in factum*. The service done might be of any kind, repair to buildings, making business contracts, etc. To entitle the *gestor* to reimbursement it must be shewn, not only that the act was beneficial when it was done (whatever happened to it afterwards) or approved by the principal, but also that it was a reasonable act of intervention, i.e., that the facts made it reasonable for him to interfere and do it. The circumstances justifying this might be very variable: absence of the principal when a matter needed attention is the most obvious, and it is likely that in the time of the *formula in factum* it was the only case. The *gestor* had to shew that the act was in the interest of the principal, not of himself. If he had an interest he must shew that he could have protected that without affecting the interest of the principal. Thus this claim could not arise between common owners. He must also shew that his act was voluntary, not *donandi animo* and not prohibited by the principal. If the latter ratified it, the *gestor* might

¹ In. 3. 27.

² In. 3. 27. 1.

treat the matter as mandate, but he need not do so, for if he was wrong and was sued *ex mandato*, he was liable to *infamia*. It was immaterial that he did not know the principal's identity. The direct *actio* of the principal was not subject to these restrictions: he had all the greater right to redress if he had forbidden the act, or it was unreasonable, done badly, or in the interest of the *gestor*.

The *gestor* must do what he undertook, and account for proceeds, being liable for *culpa* (though he did not benefit) except in cases of great urgency. The risks were in general on the principal, who must take over liabilities and repay all expenses which had been *utiles* when incurred, or accepted by him as such, even though the benefit was lost by any accident.

Tutor and pupil. *Curator* and ward. *Heres* and *legatarius* or *fideicommissarius*. These cases have already been considered¹.

COMMON OWNERSHIP². If two or more own property in common, however the community arises, joint gift, legacy, purchase or *hereditas*, they necessarily have duties to each other in respect of the common property. In the law as we know it, the means of obtaining compensation for breach of these was, in *hereditas*, the *iudicium familiae erciscundae*, in others the *iudicium communi dividundo*, *bonae fidei*, having a very specialised type of formula, and governed by similar principles. Their primary purpose was division, effected by the *iudex* under powers conferred by the *adiudicatio* clause in the formula. But, from early times, allowance was made in the action for inequalities in the division, for expenses incurred and profits received by one of the common owners, and, at least in later law, all claims arising out of breach of the obligations were taken into account in the same way.

Profits must be shared and compensation given for damage due to *culpa* of one of the owners (*culpa levis in concreto* in Justinian's time). Any of them might alienate his share and so introduce another in his place, but he could not alienate the property as a whole without the consent of all. The right to compel division at any moment might be restricted by agreement, but an agreement never to divide was void, at least in late law³. All important acts of administration, especially building on the property, required in some sense the concurrence of all, but it is not clear for classical law

¹ *Ante*, §§ 35, 38, 80. See also *post*, § 135.

² *In*. 3. 27. 3. ³ *C.* 3. 37. 5.

whether the rule was that all must assent or that none must expressly prohibit. In either view any one of them could veto such acts. It is probable that under Justinian consent of all was needed, but that if this was disregarded, there was no liability unless harm was done to the property.

Communi dividundo did not lie for expenses incurred before the community arose or after its end, or for expenses incurred for the claimant's own purposes, e.g., when he thought he was sole owner. It could not be brought after division, but there was an *actio utilis* for expenses which had been incurred before division, at any rate where the division had been without litigation in which these could have been claimed.

124. MONEY PAID BY MISTAKE. *Condictio indebiti*¹. Where property was transferred, and received, in good faith, in discharge of an obligation which did not in fact exist, it might be recovered by the *condictio indebiti*, a *iudicium stricti iuris*. This was the primary case of action for wrongful enrichment, and Gaius notes its affinity with *mutuum*, which originated in the same notion. He tells us that some held that this action lay against a woman or a pupil only where that on *mutuum* would. But it had a wider field, for it was available for any render unduly made, not, like *mutuum*, only for money or the like.

There must have been no debt, and a debt still conditional was for this purpose no debt; a debt *ex die* was a debt, and so was a merely *naturalis obligatio*. A debt to a person other than the actual payee, not authorised to receive it, was no debt, nor was one due from some other person and not paid on his behalf. To hand over the wrong thing was an *indebiti solutio*.

The payment must have been in error, and the error reasonable, and one of fact, not law (except in the case of women, children, soldiers and some others), a distinction easier to state than to apply. If the payment was made with knowledge that it was not due, this was a gift, whatever the intent of the payer. If made in doubt whether it was due or not, it could not be recovered by this action unless it was paid with a reservation of this right. But Justinian put doubt on the same level as error².

The claimant must prove the payment and that it was not due, with two limitations. If the payer was one of the privileged persons

¹ In. 3. 27. 6, 7; G. 3. 91.

² C. 4. 5. 11.

above mentioned, the whole burden of proof was on the payee. In any case if the payment was denied and proved, the payee must prove that it was due. It is doubtful whether the payer had also to prove the error, i.e., facts accounting for the error, but these would usually appear in the proof that it was not due.

On the question of risks, the chief rules are that in the case of money the risk was on the receiver: as in *mutuum*, he must repay in any case. Where it was a specific non-fungible thing, the risk was not on him: he need restore only his enrichment. As to fungibles other than money, the better view, on doubtful texts, seems to be that the value must be returned in any event.

The rule that the receiver must have been in good faith does not mean that, if he was not, the thing was irrecoverable, but that this action was not the proper remedy. It was a case of *furtum*, and recovery would be by *condictio furtiva*, which had somewhat different rules. Here, the risk was always on the *fur*, and he was liable for the highest value the thing had had at any time since the theft¹.

These rules were subject to one important limitation. There were some debts in which a denial of the claim involved double liability on *condemnatio*, e.g., claims for damage to property under the *l. Aquilia* and *legata per damnationem* of *certa*. If payment was actually made, in error, in a case in which *contra infitiantem lis crescit*, it could not be recovered as *indebitum*. No reason is recorded. The most probable explanation is that such a payment is more or less of a compromise, and a compromise carried out ought not to be undone. Another explanation is that if there was no such rule a man could effectively dispute the claim without running the risk of double liability. He would pay and then claim it as an *indebitum*. Apart from the fact that he thereby assumes the burden of proof, it is not easy to see the necessary error.

Condictio indebiti is only one expression, perhaps the oldest, of the principle that unjust enrichment ought to be set right. Its utility was widened as time went on by the inclusion of cases which would not at one time have been thought within its scope, e.g., where a legacy had been paid without making the Falcidian deduction. And, though there never was any quite general rule that unjust enrichment must be refunded, there appeared in practice, some early and some late, a number of cases of *condictio* for unjust

¹ D. 13. 1. 8. 1.

enrichment which between them cover most of the ground. Though they are not here considered in the Institutes most of them are as truly quasi-contract as *condictio indebiti* is. The chief cases are the following:

Condictio ex furtiva causa, *condictio furtiva*¹, where there was a theft. We have already mentioned this, and shall recur to it later.

Condictio ex turpi causa, *ob iniustam causam*. These are two distinct cases, but their principle is that where money was received for an immoral or illegal purpose, or by illegal or immoral means, a payer innocent of the taint in the transaction could recover. The main rules were as in *condictio furtiva*.

Condictio ob rem (causam) dati, called by Justinian *condictio causa data causa non secuta*. It lay where a *res* was handed over for a return not given. It was the typical case of innominate contract, but wider in scope, e.g., it lay where money was given as *dos*, but the marriage fell through. The risk was on the claimant.

*Condictio sine causa*². This name, which really covers most of these cases, was applied specially in later law to a small group of cases which did not come under any of these heads, e.g., where a *fullo* had paid compensation for lost goods and the owner had recovered them. There are several other cases but there is no general principle.

Condictio ex lege. Probably Byzantine. Where a *lex* created an *obligatio* but gave no special remedy, this was available.

Condictio ex poenitentia. Also probably Byzantine. In a few cases in which property was handed over for a particular purpose, and there was a right of revocation of the purpose, the remedy given was this *condictio*. In classical law there would often have been *fiducia* and the *actio fiduciae*.

The only other case of quasi-contract which needs mention (there were in fact many more) is the *actio ad exhibendum*³, an action calling for the production of a thing, for the purpose of some other proceeding. At first it may have been available only where one who alleged ownership desired to vindicate, this being possible only against one shewn to be in possession of the thing. But even in classical law it had a wider field, and under Justinian it might be used where production was required for the purpose

¹ D. 13. 1; G. 4. 4; In. 4. 1. 19; 4. 6. 14.

² D. 12. 7.

³ D. 10. 4

of any litigation, and even with no immediate bearing on litigation, e.g., to facilitate the exercise of an option in legacy. It was a personal action, *in ius*, apparently ancient. It created duties in general only from *litis contestatio*: one who then possessed must produce, the only extension of liability being that one who had already fraudulently ceased to possess was treated as still possessing. The defendant was liable if he lost possession after *litis contestatio* by *culpa* or *dolus*, but not if the loss of possession was due to accident (*casus*). Production of the *res*, even in a damaged state, satisfied the action, though there might of course in appropriate cases be an action for the damage. But if he could have produced at *litis contestatio*, and delayed, with the result that rights were lost, he was liable, and there was machinery for dealing with the case of his having usucapted since *litis contestatio*.

125. DELICT. This is the obligation to pay a penalty for a wrong done, to be distinguished from the liability which usually concurs with it to compensate for the harm done. The right to recover stolen property from the thief is distinct from the right to exact a penalty for the theft. There are some special characteristics of this form of *obligatio*, most of which are due to its history. Its origin is in revenge and possibly the first intervention of the law was the regulation of this vengeance. The next was recognition of ransom. If, for a price, revenge had been renounced, it became unlawful. The next is the establishment of a tariff of sums which must be accepted in lieu of revenge, which in turn is replaced by the system as we see it in which an action for damages is the proper remedy. It still retained traces of its origin. It was not affected by *capitis deminutio* of the wrongdoer: desire for revenge would not be. If several were concerned, all were fully liable, and what one paid would not relieve the others: revenge would not be subdivided. The *heres* was not liable: revenge is a personal matter. There is the further difference, already noted, that a mere pact not to sue was a complete defence, a generalisation from the XII Tables.

Justinian in the Institutes deals with four delicts, making them four as part of his artificial scheme of *obligatio*, which makes four types of *obligatio*, four contracts and four delicts. One of his four delicts, *rapina*, is only an aggravated form of theft for which the Praetor provided a special remedy. For Gaius, delict, like all other *obligatio*, is a civil conception. He does not deal with praetorian

wrongs, for, though *rapina* has a praetorian action he points out that it is a form of *furtum*, and though the *actio iniuriarum* is praetorian, he indicates that it rests ultimately on the XII Tables: the earliest praetorian action was in fact only an alternative remedy for wrongs dealt with by the XII Tables.

If we go back to primitive law we find the notion of moral culpability, as the basis of liability, very imperfectly recognised: a man was liable not so much because he had done wrong as because he had done harm. It was only slowly that the notion of guilt emerged clearly, but in the law of historical times it was fully recognised as the basis of liability. There were cases in the law of contract in which a man might be liable for damages, though he was in no way to blame, but in all the delicts, strictly so-called, there was a moral element: the person liable had been fraudulent, negligent or malicious. And this is equally true of the praetorian wrongs commonly treated by moderns as delicts, though it cannot be said of all actions which at any stage in their history were regarded as penal.

The four Institutional delicts are *Furtum*, *Rapina*, *Damnum iniuria datum* and *Iniuria*.

126. *FURTUM*¹. This is defined, by Justinian, as "fraudulent handling of a thing or the use or the possession of it." This is far short of a satisfactory description. The *res* must be *mobilis*, though Sabinus held that there might be theft of land, and it is quite possible that in early law, under the XII Tables, land could be stolen as well as anything else. But the old conception was probably narrower in some respects: it may be that *furtum* meant merely secret taking, *subreptio*, while, in the law as we know it, almost any fraudulent assumption of right over the thing might be *furtum*. There must be someone having a present interest in the *res*. The property of a vacant *hereditas* could not be stolen; the rule as stated by Gaius being that there could be no theft till the *heres* had entered and taken possession of the thing. But if there were other persons interested, e.g., the *res hereditaria* was under usufruct, or was held by someone who was responsible if it disappeared, e.g., a commodatary, there would be a sufficient *interesse* and an *actio furti*². As it was lawful, up to the second century, to take *res hereditariae* (*usucapio lucrativa*) no difficulty was felt till this right

¹ G. 3. 182-208; In. 4. 1.

² D. 47. 2. 69-71.

disappeared; when, precisely because there could be no *furtum*, a special remedy, *crimen expilatae hereditatis*, was introduced. We are told that in *furtum* the taking must be with a view to profit, but this unworkable rule is in all probability, not classical. The thing must, in general, be a *res aliena*. But a man could, in a sense, steal his own property by stealing the possession of it, *furtum possessionis*, e.g., if a pledge debtor stole the *res* from the creditor who held it as security. There need be no intention to deprive the owner of his whole interest: any wrongful assumption of a beneficial interest was enough. A deposittee who used the thing, a commodatary who used it in unauthorised ways, knowingly, committed *furtum usus*.

There must be *contrectatio*, handling, and it must be *fraudulosa*, and *invito domino*. Thus it was not *furtum* to take, thinking the owner would approve, when he did not, or to take, thinking the owner would not assent, when in fact he did. It was not always a simple taking out of the owner's hands: it might be by a deposittee, or from a deposittee. Even taking by delivery from the owner himself might be *furtum*, e.g., fraudulently pretending to be the actual person to whom the owner intended to deliver it¹.

Accomplices were liable, those who helped *ope et consilio*, *ope* meaning physical help, *consilio* not mere encouragement, but hints, suggestions, etc., of service to the thief. It has been suggested with some probability that *ope consilio* had not originally this reference to accomplices, but referred to the thief himself; the theft was done by his hand and design. If several were concerned, either joint principals or principal and accomplices, each was liable to the whole penalty.

There might be theft with no *actio furti*, e.g., where the thief was in the *familia*, where there could be no action, or if *vir* stole from *uxor*, or vice versa, for there could be no infaming action between these. But it was *furtum*, since the *res* became *furtiva* and accomplices would be liable².

To be entitled to sue for theft a man must have an *interesse*, and his *interesse* must be *honestum*, but not every position which we think of as involving an interest in the thing was sufficient. There were in fact two types of *interesse*. Subject to a limitation shortly to be stated, the owner and everyone who had a *ius in rem*, usu-

¹ D. 47. 2. 81. 6.

² In. 4. 1. 12.

fructuary, *bona fide possessor* and even pledgee, had an *interesse*, a positive *interesse*. No *ius in personam*, of itself, gave it; but a holder, holding by consent of the owner, and responsible to him if it was stolen, had also an *interesse*, a negative *interesse*, resulting from his liability and dependent on it. Where this *interesse* existed, the owner, having his claim against the holder, was not regarded as having an *interesse*. But if the responsibility was unreal, owing to insolvency of the person liable, or where the owner released this liability, the *interesse* of the person liable disappeared: he had no *actio furti*, and, accordingly, the owner had. This liability if the *res* was stolen was the main feature of the responsibility known as *custodia*, and there is much difference of opinion as to the cases in which it existed. Two clear cases are mentioned by Gaius, the commodatary and the *fullo* or *sartor* who receives an article to do work on it for hire. But, as to *commodatum*, Justinian made a change. He provided¹ that the owner might either claim the value from the borrower, who in turn could bring the *actio furti*, or could himself sue the thief, the commodatary then being free from liability. If he sued the borrower without knowing of the theft, he could, on learning of it, change his course, and sue the thief. But though in these cases the *interesse* depended on the liability, this might exist without the right of action. If a depositee used the thing or lent it, he was liable for loss of it, but if it was stolen he had no *actio furti*: though he had an *interesse* it rested on his wrongdoing and thus was not *honestum*.

127. The remedy for theft, the *actio ad poenam persequendam*, was the *actio furti*. By the XII Tables a *fur manifestus* was capitally punished, a freeman being flogged and handed over to the injured person as a slave, a slave being flogged and killed. A *fur nec manifestus* was liable only to an action for a twofold penalty². For the severe penalty of the XII Tables in manifest theft the Praetor substituted an action for fourfold, the twofold for non-manifest theft being unchanged, with the result that the action for manifest theft was *in factum concepta*, while that for non-manifest was *in ius*. Manifest means caught in the act, but neither "caught" nor "in the act" is quite a simple notion. On the view of the Digest *adprehensio* was needed, not mere *deprehensio*, capture, not mere identification (though the Institutes say the contrary), but immediate

¹ In. 4. 1. 16.

² G. 3. 189, 190.

pursuit and capture of the goods dropped by the thief was enough¹. On the other point some held that it must be during the theft (*dum fit*) others at the place of the theft (*ubi fit*). The view was even held that it was enough if he still had the goods, but the law seems to have settled down to the view that it must be on the same day, with the goods not yet deposited where he meant to put them. A man was, it is said, still stealing so long as he had the goods, but a *furtum* which had once become non-manifest could not again become manifest. Many reasons have been suggested for the wide difference in the penalties under the XII Tables. It may be the element of doubt where the theft was not manifest, or it may be a premium to the vigilant owner or an inducement to the owner not to take the law into his own hands: it has even been suggested that a certain credit attaches, among early peoples, to one who succeeds in getting away with the goods.

Gaius enumerates a number of subsidiary actions associated with theft. By the XII Tables if premises were searched by a man wearing only a loin cloth and bearing a dish, and stolen goods were found (*furtum lance licioque conceptum*), this was manifest theft in the occupier. The process was perhaps in origin a ritual of propitiation for the household gods, but it was not understood in the classical age. Gaius states explanations but does not accept them, and others have been offered. There was, further, an action for a threefold penalty where stolen goods were found on informal search (*furtum conceptum*) and one for a similar penalty for putting stolen goods in a man's house (*furtum oblatum*), both in the XII Tables. The Praetor gave an action for fourfold for resisting search (*furtum prohibitum*) and one for failing to produce stolen goods afterwards found on the premises (*furtum non exhibitum*), for which the penalty is not stated. These actions were disused by Justinian's time, and he declares all such facts to be *furtum nec manifestum*.

The unit on which the multiple was based was the *interesse* of the plaintiff, which for the owner, ordinarily, and for the *interesse* based on liability, was the actual value: for usufructuary the value of his usufruct. Extrinsic considerations came in. Thus, if a slave was stolen and this had prevented his entry on a *hereditas* for his master before it was too late, the value of the *hereditas* was included².

¹ D. 47. 2. 7.

² D. 47. 2. 52. 28.

The *actio furti* was *perpetua* and available to, but not against, the *heres*. *Condemnatio* involved *infamia*. It was alternative to criminal proceedings; and as ordinary thieves have no means, these were usual. It would be only in exceptional cases, e.g., where it was in the course of commercial dealings, that the thief would be worth suing.

Apart from the penal action there would be an action to recover the property, in no way barred by it (*ad rem persequendam*). There would be the ordinary remedy of a dispossessed owner, *vindicatio*, with the accessory proceedings (*actio ad exhibendum*, possessory interdicts) but there was also a remarkable alternative remedy, *condictio ex furtiva causa*, *condictio furtiva*, which lay against the thief or his *heres*. It asserts a *ius in personam*, a duty to transfer the ownership to the plaintiff. This looks absurd, for the ownership was his already and Gaius can suggest only that it was allowed *odio furum*. This explanation is inadequate: no doubt the real explanation is historical. It may be that at one time it was allowed only where the *res* was extinct or it may date from a time when ownership was loosely conceived and a thief was regarded as having wrongfully become owner. It is similar in its main rules to the *actio rerum amotarum* which served the same purpose in cases of theft between *vir* and *uxor*. Both were *perpetuae*, available to and against the *heres*, and neither depended on the continued existence of the thing. But while *condictio furtiva* was *in ius* and *stricti iuris*, the other was *in factum concepta*. It seems clear that plaintiffs relied on *condictio* rather than *vindicatio*, as it was not necessary to prove possession of the *res*. It should be added that *condictio* was available only to the owner and the pledge creditor.

*RAPINA. VI BONORUM RAPTORUM. Robbery*¹. In the troublous days towards the end of the Republic there was much magisterial legislation on the subject of damage or theft committed by bands of men. In the famous Edict of Lucullus (B.C. 78) the two forms of wrong were dealt with together, and they so continued in the Edict as settled by Julian. But there were distinct actions, and we are concerned with that for violent theft, in which, in practice, the need of proof of an assemblage of men had disappeared. It was an *actio in factum* for fourfold, *condemnatio* involving *infamia*. But the fourfold included the value of the thing; there was not, as in

¹ G. 3. 209; In. 4. 2.

theft, a separate action for the property. It was *annua* as to the penalty, but *perpetua* for single value, but was not available against the *heres*. It was in general governed by the same principles as *furtum*, though there are signs of difference as to what was a sufficient *interesse*. It was alternative to the *actio furti*: the plaintiff would choose which was the most favourable in the circumstances.

Seizure by force, even in good faith, needs repression: it was criminally punished in the Republic, and M. Aurelius provided that one who seized property to satisfy a claim should forfeit the claim. In A.D. 389 detailed provisions to similar effect were laid down. If the claim was unfounded, the property was to be handed back with an equivalent penalty. This applied to land as well as moveables.

128. *DAMNUM INIURIA DATUM*¹. The XII Tables contained some provisions against certain specific forms of damage, and there was later legislation probably of the same type of which we know only that it existed. All this legislation was practically superseded in importance by the *l. Aquilia*. This statute clearly did not repeal the existing legislation for some of it is found in force in classical law, but the *lex* was so comprehensive that the other provisions are unimportant. Its date is unknown, but that it was early is shewn by the fact that the *lex* contains a provision (the second *caput*) for dealing with fraudulent *adstipulatores*, which would hardly have been needed if the consensual contract of mandate had been in existence, and, so far as we know, mandate is the oldest of the consensual contracts. The full name of the wrong is *damnum iniuria datum*, damage done contrary to law, but it often appears under the shortened name *damnum iniuria*. We even find *damni iniuriae*.

There are several provisions, two of which concern us. They appear in the Digest in what purports to be their textual form, but the language has been modernised and it is far from certain that the substance is unchanged.

The first *caput* provides that one who unlawfully kills another's slave or beast (*pecus*, such as feed in herds), must pay the highest value the slave or beast has had within the previous year. The third *caput* provides that for other damage to these or any destruction or damage to other property (*urere, frangere, rumpere*) the

¹ G. 3. 210-219; In. 4. 3.

penalty was the value within the previous month, which was understood to mean highest value, and not necessarily the whole value, but the difference between this highest value and the value after the damage.

The action (*actio e lege Aquilia*) was regarded as penal, though, in some cases, it might give no more than compensation. It did not lie against the *heres*. It was not destroyed by *capitis deminutio*. Where several were concerned the liability was cumulative, i.e., it was a normal *actio ex delicto*. Further, it was *duplex contra infitiantem*, a sign that the original remedy had been *manus iniectio*. Where the facts were admitted, it was called *actio confessoria*.

The wrong need not be wilful; negligence, even the slightest, sufficed, but it must be a positive act. A mere omission, whatever damage it caused, was not within the *lex*. There are indeed some cases which look like mere omissions, e.g., one guarding a fire neglects it and it spreads to a neighbour's house¹. But in all these cases there has been some previous positive act amounting to assumption of responsibility. The rule that negligence sufficed raises a question not answered by the texts. If there was a contract between the parties, e.g. deposit, under which negligence did not create liability, and, by negligence, damage was done to the *res deposita*, did the *lex* apply or did the contract protect the negligent party? The dominant view is that there was a liability under the *lex*.

The defendant's conduct must have been the cause of the damage. This was usually clear enough, but some cases raise difficulty. If the conduct was negligent, not wilful, and the harm would not have happened but for the negligence of the plaintiff, contributory negligence, this was a defence: the defendant's act was not the cause of the harm. But that rule does not seem to have been applied where the defendant's act was wilful, though the causal connexion was equally broken. If the act of a third party intervened, as a new cause, there was a breach of connexion. If *A* wounded *B* mortally, but, later, *C* stabbed and actually killed him, *A* had wounded, but not killed², *B*, whether his act was wilful or negligent. Difficult questions arise where several were concerned in the wrongdoing and it might be hard to say who killed. But into these we need not go.

¹ D. 9. 2. 27. 9.

² D. 9. 2. 11. 3. But D. 9. 2. 51, obscure, is in at least apparent conflict.

The Statute was at first interpreted very narrowly. The word *occidere* was supposed, on etymological grounds, to require that the act be done with a weapon held in the hand; but in practice any direct destruction or damage by the person of the wrongdoer or by a missile or actual administration of poison early sufficed. All this was expressed by the rule that it must be *corpore corpori*, by the body to the body. Again, the word *rumpere* in the third *caput* was construed as *corrumpere*, which covered all physical damage and made the other words unimportant. And though the *lex* originally applied only to moveables, it was early understood to cover land. In reckoning the highest "value," extrinsic facts came into account, i.e., *damnum emergens* and *lucrum cessans*. The former is illustrated by killing one horse of a pair, the single surviving horse being worth less than half the pair. The latter is illustrated by the killing of a slave who had been instituted *heres* by an *extraneus* but had not yet entered, so that the *hereditas* was lost.

As so understood, the *lex* fell far short of dealing with all cases, and the Praetor amplified its rules, so as to give a fairly complete scheme of redress. He could not give the Aquilian action, but he gave praetorian actions, in some cases an *actio utilis e lege Aquilia*, in others an *actio in factum*. What principle determined which it was in any case is not clear, for Gaius, the Institutes of Justinian and the Digest give conflicting accounts. The point is not important, for, though it might have meant that the *actio utilis* was governed by the rules of the Aquilian action, while the *actio in factum* was only for an indemnity and not *duplex contra infinitantem*, there is no sign of any such distinction. The Praetor's main extensions were:

(a) The *lex* gave an action only to the owner (*herus, dominus*): the Praetor gave one to the holder of any *ius in rem*, e.g. usufructuary, for his *interesse* the *herus* having also his action, and to a *bona fide possessor*, who might, however, have to pay over the damages to the owner. Even a pledgee had it, in later law, in some circumstances. A mere *ius in personam* did not give it, though the *colonus* had it for damage to his crops¹, but this is hardly an exception, for they are his property, if he gathers them.

(b) *Leges* did not apply, except expressly, to *peregrini*. But an *actio fictitia* was given, either way, "as if he were a *civis*."

¹ D. 9. 2. 27. 14.

(c) The *lex* dealt only with what was owned. A man did not own his body, but the Praetor gave an action where a *paterfamilias* or his *filiusfamilias* was injured, but not where he was killed.

(d) The Praetor gave an action where it was not *corpore corpori*, e.g., where grain was thrown into the sea (*corpore non corpori*) or where poison was put where a beast was likely to eat it, and he did (*corpori non corpore*), or where a stable door was opened, so that beasts escaped and were lost (*nec corpore nec corpori*).

129. *INIURIA*¹. This, as the Institutes tell us, is a word of many meanings. We have just been using it to mean "contrary to law." It is also used to mean injustice of a magistrate or *iudex*, but the meaning with which we are here concerned is insult, *contumelia*, contemptuous conduct and the like, for which Justinian gives, as the Greek equivalent, ὕβρις.

The provisions of the XII Tables on the subject are, as might be expected, crude and narrow. They deal practically only with personal assaults and the like, with or without personal injury (for though they penalise *malum carmen*, this means magic incantations, not slander). For *membri ruptio*, there was a right of retaliation with a right to agree for a composition, but in most cases there was a fixed money penalty. Money values changed so greatly that these penalties became meaningless, and the Praetor established an *actio aestimatoria iniuriarum*, with a formula *in factum* and variable damages, but covering only the cases of the XII Tables. Under Sulla a *l. Cornelia*² created a criminal remedy for these cases, and it is sometimes held (but it is difficult to reconcile the view with the texts) that thereafter, till near the end of the classical age, the praetorian action was excluded in these cases. However that may be, the range of the praetorian action was widened by a series of edicts covering all manner of insulting acts. The notion of *iniuria* being thus widened, the original edict was soon understood to cover all these cases and was called the *edictum generale*, the other edicts becoming less important. There was yet a further evolution. The word *iniuria* ceased to be a mere collective term to include the cases under the various edicts and nothing more. It came to denote a substantive wrong consisting in wanton interference with another's rights, of which the edictal cases were only instances, any act shewing contempt of personality, or having a

¹ G. 3. 220-225; In. 4. 4.

² P. 5. 4. 8; D. 47. 10. 5.

tendency to lower the public estimation of the victim, being an *iniuria*. It is this wide range of the action which accounts for the absence from Roman Law of many remedies which are found in our own.

This action, like all delictal actions, was based on revenge, but it was *vindictam spirans* in a special sense. It did not, of course, lie against the *heres*, but it was not available to the *heres* of the insulted person. It was *annua*, and, as it rested on outraged feelings, it did not lie unless anger was shewn at the outset, *dissimulatione aboletur*. The damages might vary not only according to the act, but according to the position, relative or absolute, of the parties. Where the wrong was defamation, error in the identity of the insulted person was no defence, but truth was a complete reply to the claim¹. Aiders and abettors were liable even though they gave no more than encouragement.

The *iniuria* need not be directly to the plaintiff: what was done to *A* might be an insult to *B*. An insult to a woman would be an insult to her *paterfamilias*, her husband and herself. An insult to a *filiusfamilias* gave actions for the *iniuria* to him and to his *paterfamilias*; the latter, in fact, bringing them both. There were many other such cases, and it must be remembered that in the different actions to which the *iniuria* might give rise the measure of damages would not necessarily be the same. But an insult to a *paterfamilias* was not necessarily an *iniuria* to his wife or *filiusfamilias*.

Iniuria might be committed in respect of a slave. For thrashing or torturing a slave the master could sue with no proof or allegation of intent to insult him—"hanc enim et servum sentire palam est²." Apart from this case no action lay for *iniuria* to a slave unless of a very serious kind (*atrox*) and then not as a matter of course, but only at the discretion of the magistrate, *causa cognita*. If intent to insult the master plainly appeared, the action was said to be *domini nomine*. Apart from this it was *servi nomine*, but it was still really on account of the master, and it is doubtful if the distinction is classical. If there were several owners, each might have the action, and persons with less extensive rights, usufructuary or *bona fide possessor*, might have it. In all these cases there might be very varying measures of damages, for, in addition to the points already mentioned, quality of the act, rank of parties, etc., an *iniuria* to a

¹ D. 47. 10. 18. pr.

² D. 47. 10. 15. 35.

trusted secretary or agent was a more serious matter than one to a remote farm labourer.

The distinction between *atrox* and ordinary *iniuria* is prominent in the texts. It was probably not precise: the Praetor decided the point. We are told that it might be *atrox ex re* (or *facto*), i.e. its nature, *ex persona*, to one entitled to special respect, a magistrate or the offender's patron, and *ex loco*, in a public place. We also hear of *ex loco vulneris*, e.g. a blow in the eye, but this is only an instance of *atrocitas ex re*. Apart from the fact that it was only for *iniuria atrox* that an action lay for what was done to a slave, the damages were higher and arrived at in a different way. Ordinarily the plaintiff claimed an amount as a maximum, which the *iudex* could cut down: in *iniuria atrox* the Praetor fixed the maximum, and in practice the *iudex*, if he found the case proved, adopted this figure.

In many cases, and, in later law, apparently always, there was an alternative criminal remedy, used mainly in important cases, but the only mode of redress if the offender was without means. In whichever way the matter was tried, *condemnatio* involved *infamia*.

130. These are the only delicts treated systematically, by Gaius and Justinian in their Institutes. In view of the fact that the more specialised cases were all covered by these and that, for Gaius, delict, like contract, is a civil conception, it may be an exhaustive list for his time. But many praetorian wrongs are in effect delicts and might have been so treated by Justinian. Enumeration is unnecessary, and would be difficult, for many actions which seem in later law to be quasi-contractual, or at any rate as *ad rem persequendam*, were, in their origins, looked on as penal. It is not possible to say how many of these there were, or, in many cases, when the change of view occurred. But a few praetorian wrongs, essentially delictal, as described in the sources, are of such importance that they must be mentioned.

*SERVI CORRUPTIO*¹. A praetorian remedy *in duplum* for wilfully making a slave worse, physically, mentally or morally, covering a wider field than the *l. Aquilia* and its extensions. It might be brought by anyone having a *ius in rem*, so that usufructuary might have it even against *dominus*, and vice versa. It was *perpetua*, but

¹ G. 3. 198; In. 4. 1. 8; D. 11. 3.

not available against the *heres*. The damages would include incidental loss or liability imposed on the owner. If the *corruptio* had consisted in inducing the slave to commit a wrong, the action on this wrong was quite independent. Our action was not affected by death, alienation or manumission of the slave, but there was a rule of late law that the owner might choose between bringing this action or handing over the slave, claiming his original value.

Gaius discusses the case where *A* tries to induce *B*'s slave to steal from *B*, but the slave tells *B*, who instructs him to proceed, intending to trap the inciter. He holds, quite logically, that there is no *actio servi corrupti*, as he is not corrupted, and no *actio furti* as the taking is not *invito domino*. Justinian allows both actions: what was really needed was protection against attempted wrongs, a matter in which the Roman Law was defective.

*METUS*¹. The *actio quod metus causa* was part of a complicated praetorian machinery to remedy the mischief where a man was compelled by threats to go through a legal transaction, or, at least in later law, to do any act detrimental to his property rights. The nature of the threats we have already considered. It was an action for fourfold damages in default of restitution, not, so far as appears, infaming. It has the peculiarity that it lies not only against the wrongdoer, but against anyone who has profited, however innocently. The *condemnatio* was incurred only if the defendant had not made good the damage, at some time before judgment, either with or without an order of the *iudex* so to do. Failing this, the fourfold *condemnatio* proceeded. But, to avoid the *condemnatio*, the actual wrongdoer, being *in mora*, had to set the matter right even though the property had been destroyed by accident: the risk of *casus* was on him. An innocent defendant was bound to restore only his actual profit. The action was not available against *heredes* except as holders, and though the fourfold action was *annua*, there was an *actio perpetua in simplum* against any holder of proceeds. It is not clear on the texts what effect in classical law the payment of the fourfold penalty had on the transaction. Under Justinian it is clear that the transaction stood: the penalty included the compensation, and he calls the action an *actio mixta* for that reason. But it is maintained by some writers that in classical law this action, being purely penal, did not affect the right to the *exceptio*

¹ D. 4. 2.

metus or to *restitutio in integrum*. Where several were concerned, each was fully liable, but the texts say, and this agrees with what seem to be the words of the Edict, that restitution by one frees all. They also say that payment under the *condemnatio* by one frees all¹. This is not so clear on principle, and the proposition is widely held to be interpolated, an opinion also held of the other case, though with less reason, by some writers.

*DOLUS*². Something has been said of this in connexion with the essentials of contract³. It is defined as "any craft or deceit employed for the circumvention or trapping of another." Here, too, there was a complicated system of praetorian remedies, similar to those in *metus*. Our concern is with the *actio doli*. As in *metus*, the action lay only if the harm had not been made good, and was *annua* and did not lie against the *heres*. It seems clear that payment either voluntary or under judgment barred any other remedy. If several were concerned all were fully liable, and the texts tell the same story as in *metus*, as to the effect of payment by one, voluntary or under judgment⁴. But there were important ways in which this action differed from *quod metus causa*. It was *in simplum*, not four-fold. It lay only against the wrongdoer, not against innocent holders. *Condemnatio* involved *infamia*, and thus it was not allowed against the *paterfamilias* or patron or any person of markedly higher rank: in such cases there was an *actio in factum* for enrichment, not infaming, and there was a similar action in all cases after the year. In any case the *actio doli* was allowed only by leave of the Praetor, *causa cognita*, and this leave was not given unless the matter was of some importance. Further, it was subsidiary: it was allowed only as a last resource, not if there was any other remedy, or even had been, unless indeed this other remedy was illusory, on account of the insolvency of the person who would be defendant. Even in classical law the rule was so far relaxed that this action might be given as an alternative to the *actio metus*, and the texts shew that there was some, quite unsystematic, relaxation in Justinian's law.

Some special cases were dealt with by special remedies, e.g., frauds on creditors and frauds on patrons, but with these we shall not deal.

¹ D. 4. 2. 14. 3.

³ *Ante*, § 97.

² D. 4. 3.

⁴ D. 4. 3. 17. pr.

131. QUASI-DELICT¹. This, the fourth of Justinian's types of *obligatio*, is not found in any earlier source. It is sometimes said to be included under *variae causarum figurae*, but as all the cases are praetorian, it seems probable that they would have had no place at all in the scheme of Gaius in his Institutes, though he may have dealt with them elsewhere. The cases dealt with by Justinian are:

Iudex qui litem suam facit. This was an *actio in factum* against a *iudex* who, through bias, incompetence or corruption, gave a clearly wrong decision, or who gave one not authorised by the *formula*, or, perhaps, neglected his duty in any way. It was for the resulting damage, and did not lie against the *heres*. As it seems that there was some means of proceeding against a *iudex* in such a case, at civil law, before this remedy was introduced (what it was is unknown), it is possible that this case may differ from the others in being a simplification of a pre-existing civil proceeding. But it is possible that the earlier proceeding was not judicial, but administrative.

Res deiectae vel effusae. If something was thrown from a dwelling, on a way commonly used, to the damage of person or property, the occupier was liable to an *actio in factum*, *in duplum*, where property was damaged. It was *perpetua*, and not available against the *heres*. If a freeman was injured, the action was for simple damages and failed if the man died. In that case there was an *actio popularis*, for fifty *aurei*. In all cases, if there were joint occupiers, satisfaction by one released all. If the occupier was a slave the question arises whether the action was noxal. The text denies this on the ground that the slave occupier is not necessarily a wrongdoer. But it is sometimes said that this is Byzantine, the *actio* having been noxal in classical law.

Res suspensae. If something was suspended over a way commonly used to the danger of passers, the occupier was liable to an *actio popularis* for ten *aurei*, on similar principles.

*Nautae, caupones, stabularii*². Those who conducted an inn or a trading ship or a public stable were liable for theft or damage by persons employed therein, whether their slaves or not, and, in the case of the inn, for such acts by permanent residents therein. The action was *in factum* and *in duplum*. If the wrongdoer was a slave

¹ In. 4. 5.

² In. 4. 5. 3; D. 47. 5; 44. 7. 5. 6.

of the person liable, the action was noxal and failed on the death of the slave: in other cases death of the wrongdoer did not affect it. As the Edict required identification of the wrongdoer, it is obvious that there were other remedies, which were alternative.

It is not probable that this list covers all cases which Justinian might have called quasi-delict, and the question arises: what is the common quality of the cases actually treated? Various suggestions have been made: perhaps the most probable is that they all are or may be cases of vicarious liability, in full, for though the *iudex* is a wrongdoer, the method of treatment is to make him responsible for someone else, who has benefited by his wrongdoing. But this is not easy to reconcile with Justinian's own clumsy attempt to shew personal wrongdoing in the *nauta*, etc.

132. NOXAL LIABILITY¹. The subject of quasi-delict affords a convenient transition to the discussion of the question how far, and in what ways, one might without having been a party, be responsible for another's delict. The principle is different from that in contract, where civil law knew no such liability. But delictal liability is based on revenge, which would be exercised against the actual wrongdoer, and the law early recognised a right in the *paterfamilias* to redeem the wrongdoer from seizure, by paying the regular penalty for such a wrong as had been done. As time went on, this came to be regarded as a liability either to pay the damages or to surrender the offender, and in later law it is clear that payment by the *paterfamilias* was regarded as the primary liability, surrender being a way of avoiding this, a reversal in principle of the ancient view. The XII Tables laid down the system for *furtum*, the *l. Aquilia* laid it down for *damnum*, and the Edict applied it to *rapina*, *iniuria* and many other wrongs. The rules were not quite uniform, *damnum* having special peculiarities, and the mode, and even the extent of the application of the principle to praetorian wrongs is obscure on the texts, many of which have been "interpolated." In *iniuria* it was usual, at least in unimportant cases, to allow, instead of noxal surrender, the handing over of the slave to be flogged and returned². Though noxal surrender had, strictly, no place in contract, we have already seen that there were difficulties where the master made a contract and the slave did an act which if done by the master

¹ G. 4. 75-80; In. 4. 8.

² D. 47. 10. 17. 14-17.

would have been a breach of his contract. In the later law, one way of meeting the difficulty, where the act was also a delict, was to allow the master to be sued on the contract, but to let him avoid the liability by handing over the slave (*pro noxae deditione*).

The master's liability depended on *potestas*, which here means the legal, and the actual, power, to produce the offender, though one who had fraudulently ceased to have *potestas* was liable as if he still had it. If, in the action, the offender was produced and no steps were taken in defence, the magistrate would authorise the plaintiff to take him (*duci vel ferri iubere*). The receiver would become owner, if the transferor was, and, in any case, would usucapt. If the owner neither defended nor surrendered he was liable in full. If he was absent but the slave was present, there would be *ductio*, under which the receiver would usucapt. But any other person interested, e.g. usufructuary, might defend on behalf of the absent *dominus*. Till judgment, surrender released the *dominus*, but on *condemnatio*, which ordered payment, with a right to avoid this by surrender, the surrender no longer released the *dominus* unless it was free of any rights in other persons. And if proceedings under the judgment became necessary, they were for the damages only.

Noxa caput sequitur: the person liable was the owner at the time of the action, so that if, in any way, the owner at the time of the wrong had then ceased to own, he was not liable, though someone else might be. But if at the time of the delict, or later, the slave was in the *familia* of the injured person, there was no noxal action, and it could not be created or revived by transfer. As to revival, the Proculians had held otherwise, but this, the Sabinian, view prevailed. If the slave died during the action it seems that in classical law there might be a surrender of his body, but, under Justinian, the master was fully liable.

A *bona fide possessor* was liable noxally, but a usufructuary was not, though if the owner surrendered, he could not enforce his right without paying the damages: hence his right to undertake the defence, if the *dominus* would not.

Under the *l. Aquilia* there were special rules. The principle of *potestas* was not applied: only the *dominus*, not a *bona fide possessor*, could be sued. And if the slave was *in fuga*, an owner could not be sued in ordinary cases, as he had not *potestas*, but under the

l. *Aquila* he could¹. Probably the owner need only give security to produce him when it became possible.

Noxal liability covered slaves and *filiifamilias* in classical law, but a *filiusfamilias* was entitled to release when he had worked out the debt, and a text in the Institutes applies the same rule to slaves for the time of Justinian.

If several of a man's slaves were concerned, he was liable at civil law, fully in respect of each. But the Praetor limited his liability in damages to what would be due if one freeman had done the act, alternatively to the surrender of all the slaves. This applied however only where it was clearly one delict. It was not applied at all to *iniuria*, the act of each man being thought of here as a separate delict—*plura facta*. There were analogous rules for *publicani*, which need not be stated in detail.

*PAUPERIES*². Under the XII Tables, there was a similar procedure, *actio in simplum* with a right of surrender, for damage done by a beast, the damage being contrary to the nature of such beasts, which limits it to domestic animals. But the Institutes also apply it to wild beasts, and we are also told that where a wild beast escaped and did damage the previous holder was not liable, as he had ceased to be owner, which implies that he was liable before. It may be therefore that, as has been suggested, the limitation to domestic beasts and acts *contra naturam* is Byzantine. The general rules are as in noxal actions. The XII Tables gave the action only for quadrupeds, but there was later an *actio utilis* for the acts of other animals.

The Edict of the Ediles³ provided that if a dangerous beast was kept by the wayside and did harm, there should be a claim for double damages for injury to property, for damages to be settled by the *iudex* for injury to a freeman, and a penalty of 200 *solidi* if a freeman was killed. This seems to be designed to meet the difficulty that there could be no *actio de pauperie*, as if the beast has escaped there is no ownership, but Justinian declares it alternative to that action.

¹ P. 2. 31. 37; D. 9. 2. 27. 3; 9. 4. 12.

² In. 4. 9.

³ In. 4. 9. 1.

CHAPTER XV

THINGS. OBLIGATIONS. INCIDENTAL RULES. PLURALITY OF PARTIES. SECURITY FOR DEBT

133. In explaining the content of the different *obligationes* considered in the two immediately preceding chapters we have had occasion to mention some notions the full discussion of which would have inconveniently interrupted the general account of the topic. Some of these we must now consider.

NATURALIS OBLIGATIO. This notion, rooted on that of *ius naturale*, itself closely allied with that of *ius gentium*, is traceable in legal texts in the latter half of the first century of the Christian era. At that time *obligatio* was a civil conception, but that is not inconsistent with the recognition of *obligatio naturalis*. That too was in fact a civil notion: it owed nothing to the Edict. It was the jurists who reached the doctrine that a dealing which had not taken a recognised form, and thus was not directly enforceable, had nevertheless, at least in some cases, a claim to recognition as producing some legal effects. In particular, if a payment had been made under such a transaction it was irrecoverable: the existence of the *obligatio naturalis* was a reply to the *condictio indebiti*¹, with no need of an *exceptio*. We have to consider when such an *obligatio* arose and what were its effects.

Though, at bottom, every *naturalis obligatio* was a moral obligation, the converse is not true: not every fact in which a modern, or even a Roman, eye would have seen a moral obligation gave rise to an *obligatio naturalis*. It is generally held, for instance, that a pact, except a pact to pay interest, did not create an *obligatio naturalis*. In fact the list of such obligations looks rather haphazard. The earliest application of the idea seems to have been to transactions by slaves, which, whether between slave and master or with a third person, created a *naturalis obligatio*, operative when the slave became free. A transaction by a *filiusfamilias* with a member of the *familia* created a *naturalis obligatio*: if with an outsider, it created, as we know, a civil obligation, but if this was destroyed by *capitis deminutio*, or was within the *sc. Macedonianum*,

¹ D. 46. 1. 16. 4.

there was a natural obligation. Those *in mancipio* and *filiaefamilias* were probably in the same position as slaves in this matter. *Litis contestatio*, which destroyed an existing *obligatio*, substituting another, left nevertheless a natural obligation surviving, which would be material if, for any reason, the litigation was not carried through. It is likely that where a minor had obtained *restitutio in integrum*, or, under Justinian, had contracted without his curator's *consensus*, or a pupil (without profiting, which would create civil liability to the extent of profit,) had contracted without *auctoritas*, there was a natural obligation. There are many other possible cases. The list was a gradually developing one: there are writers who hold that all the cases except those of slave and *filiusfamilias*, within the family, are post-classical.

The only effect common to all natural obligations was that it was a reply to *condictio indebiti*. But there were other possible effects. A pledge or guaranty given on it might be valid. It might be a basis for a *novatio* by which it would be turned into a civil obligation. Most, if not all, of these effects applied to the obligation of a slave and to the similar obligation of a *filius* to his *pater*. On the other hand the obligation of the *pater* to the *filius* had no force beyond *solutum non repetere*. In most of the cases it is not certain which of the effects were produced. It will be noted that all the effects mentioned involve something like approval or confirmation by the person liable. There was never an action against him, but there was one possible effect which did not depend on his consent. There is evidence that in some cases an *obligatio naturalis* might be pleaded as set off in an action. But the evidence suggests that this applied in classical law only to the undertakings of a slave and these were in an equivocal position owing to the existence of remedies against the master.

134. INTEREST. This might be due either by agreement in any transaction or by rule of law. The agreement must normally be by *stipulatio*. But pact sufficed in *fenus nauticum* and a few other cases, including, under Justinian, loans by bankers, and in any *mutuum* a pact for interest created a *naturalis obligatio*¹. It was due by law in some transactions, e.g., in sale from the time when the goods were delivered, in debts to minors, in some cases of *dos*, and as between *socii*, parties to mandate, and tutor and ward, on

¹ C. 4. 32. 3.

account of money held and, conversely, of expense incurred. It was due in classical law for *fideicommissa* and *legata sinendi modo*: under Justinian for all legacies and the like. In all *bonae fidei* transactions interest was due from *mora*.

MORA. This was wrongful failure to discharge a legal obligation on demand made at a fitting time and place. It must be wilful: failure to appear, by mistake, or in a *bona fide* belief that there was no *obligatio*, or doubt about it, or by mishap, did not suffice to put a debtor *in mora*¹. This, the only real *mora*, is sometimes called *mora ex persona* as contrasted with *mora ex re*, but that expression has little authority: it means no more than that interest was sometimes due by law on failure to perform, without demand (*dies interpellat pro homine*), and that if, on the facts, there was no one available from whom demand could be made, there might be *mora* without it. But one liable to *condictio furtiva*, or to *condictio ob turpem* (or *iniustam*) *causam* was always *in mora*.

The chief effects of *mora* of the debtor were two. The thing was at his risk except where the loss was imputable to the creditor or, in later law, where the loss was such as would have occurred equally even if the thing had been handed over². If the debtor was in bad faith, the thing was taken at the highest value it had had at any time since the *mora*. In *bonae fidei* transactions, he must account for all fruits and the like received since the *mora* and must pay interest from that date.

A creditor might be *in mora*. If he wrongfully and wilfully failed to appear at the time and place fixed for payment (apart from excuses like those of a debtor mentioned above) he was *in mora*.

The main effects of *mora creditoris* were the following. The thing was at his risk, the debtor being liable only for *dolus*, whatever the liability before. The creditor must pay all expenses from the *mora*, and, where there was interest, this ceased to run, if the money was deposited in court.

Mora was said to be purged, for the future, if the other party waived it or if the act was duly done which ought to have been done before, or if the debt was novated, i.e., transformed into another debt, by a process shortly to be considered³.

¹ D. 12. 1. 5.

² D. 4. 2. 14. 11.

³ D. 13. 1. 17; 18. 6. 18.

135. *CULPA*. In dealing with the different *obligationes* we have had occasion to note that, in some, *culpa* created liability, in others only *dolus* had this effect. *Dolus*, the nature of which we have already considered, always created liability for resulting harm. *Culpa* is a more difficult notion to deal with. It may be roughly described as negligence, or, with more apparent precision, as failure, in any given relation, to observe the standard of conduct which the law requires: more care may be reasonably asked for in some relations than in others. But the texts as we have them under Justinian do not commonly use this language. They usually speak not of the different degrees of care needed, but of different degrees of negligence shewn. We hear of *culpa levis* or *levissima* or *culpa*, simply, which means failure to shew the care of a *bonus paterfamilias*; *culpa lata*, which means to shew less care than any reasonable person would shew, and *culpa levis* in another sense (called by commentators *culpa levis in concreto*, as opposed to *culpa levis in abstracto*) which means shewing less care than the person concerned did in his own affairs, which, clearly, might be either a greater or a less degree of negligence than either of the others. The general rule of the texts, subject however to many exceptions, is that one who benefited under the contract was liable for *culpa (levis)* and one who did not benefit, only for *dolus*, with the proviso that, at least in later law, one liable for *dolus* was liable also for *culpa lata (culpa lata dolo aequiparatur)*. But the liability is sometimes stated as being for *culpa levis* in the sense of shewing less care than in his own affairs. In some of these, e.g. *tutela* and deposit, principle requires liability only for *dolus* and *culpa lata*, and other texts so state the matter. In others, e.g. *socii*, common owners and husband in respect of *dos*, we should expect *culpa levis* and other texts so state the rule. *Negotiorum gestor* did not benefit but he is said to be liable for *culpa levis*. For *tutores* we get, in different texts, all three grades stated¹. It is plain that there have been alterations by the compilers, some of them rather haphazard, and it also appears that there was in classical law a stiffening up of the liability of *tutor*, mandatary and probably *heres* and *negotiorum gestor*. The grades were in all probability not known to classical law, though the ideas they express may have been. But there is some evidence that really gross negligence, and even

¹ D. 27. 3. 1. pr.; 26. 7. 7. 2, 41; C. 2. 18. 20.

shewing less care than one did in his own affairs, was in fact regarded as actual *dolus*, not something to be treated in the same way. The suggestion of fraud is obvious. It is not necessary to go into detail on this difficult topic, but three further remarks are needed.

Dolus and *culpa lata* were never presumed: it was for the plaintiff to prove them, but *culpa levis* was presumed, in the sense that, if a thing was damaged, in the hands of, say, a *conductor*, or the other party's interest in some way injuriously affected, it was for the defendant to shew that he had not in fact been careless, i.e., that he had acted with due care.

Culpa meant, originally, active conduct, *culpa in faciendo*: negligent omission was *negligentia*, of which the opposite was *diligentia*. But the distinction was lost sight of in the texts dealing with *bonae fidei* transactions such as we have been discussing.

Of *stricti iuris* relations, no question of *culpa* could arise in *mutuum* or the contract *literis*. In *stipulatio* to give a specific thing, apart from express agreement, there was no liability except for *culpa in faciendo* and only for such as made delivery impossible¹, apart from *dolus* or anything construed as *dolus*. The same rule seems to have applied in *condictio sine causa*. In *stipulatio faciendi* there was liability for *culpa levis*. In the *condictiones* based on bad faith or improper dealings the risks (and therefore liability for all *culpa*) were on the debtor.

CUSTODIA. This expression, which primarily means "watch" or "guard," is used in texts dealing with various legal relations to denote a certain degree of responsibility for care of a thing, especially responsibility if it was stolen. The confusing state of the texts has led to much controversy, still active, as to the nature of the obligation and the relations to which it applied. On one view it meant, in classical law, absolute liability if the thing was stolen (but not if it was taken by force) cut down by Justinian in most cases, but not in all, to an obligation to shew the care of a *bonus paterfamilias* in guarding against theft. On another view the absolute liability contended for did not exist in classical law, except as the result of express agreement (e.g. where a carrier received the goods "*salvas fore*"): in other cases it meant *exacta diligentia* applied to the care of the thing against theft. This might seem to be needless, since all the cases of *custodia*, surely evidenced, were

¹ D. 4. 3. 7. 3.

relations with a liability for *culpa*, and, on this view, a liability for *custodia* would add nothing. But it must be remembered that the rule may date from a time when *culpa* meant careless act, not careless omission, and the obligation of *custodia* stated a further duty of positive acts of care. On this view, Justinian here and there erected into an absolute liability what was not such in classical law. The first view is the more widely held. The language of the jurists is not necessarily so precise as to entitle us to say that wherever the word *custodia* is used to express an *obligatio* the meaning must be the same, and while it seems likely that the absolute liability in classical law was wider than is admitted on the second view, there is no sufficient ground for holding that wherever the word appears an absolute liability is meant.

There are wide differences of opinion on the question to what relations the obligation, whatever its extent, applied. On one view it covered a very large field, and the writers who maintain this are mostly those who contend for absolute liability. Perhaps the most acceptable view is that, as an absolute liability (and except as this it is of small importance in any but very early times), it applied only, apart from agreement, to commodatary, the paid worker on goods (*fullo*, *sarcinator*) and perhaps *nautae*, *caupones*, *stabularii*.

136. ASSIGNMENT OF *OBLIGATIO*. We have seen how by mandate to sue, *procuratio in rem suam*, the difficulty of assignment of *obligatio*, due to its personal character, was surmounted¹, so that in the time of Justinian a creditor could make a completely effective transfer of his rights. It was only for the creditor that this machinery was designed, for though it may, and often does, happen in commercial life, that *A* assumes a liability of *B*'s, no such arrangement between them can bar the creditor from his right against *B*. If the creditor took part in the arrangement, and accepted a liability of *A* in lieu of that of *B*, there would be a transfer, in effect, but it was not so thought of: it was novation, the destruction of one obligation, and the creation of another to replace it.

There were many events in the law, *adrogatio*, inheritance, etc., which transferred rights from one person to another, and some, but fewer, in which the duties also passed. But a glance at what has been said of the various cases will shew that in no case, except perhaps *hereditas*, was the passing of the obligations regarded as

¹ *Ante*, § 118.

an immediate and obvious result of the event; there was always some sort of legislation, as in *fideicommissa hereditatis* and *bonorum venditio*, or some artificial theory, such as we saw used to explain the acquisition of rights, under *adrogatio*.

There were many circumstances in which a man was under an obligation to transfer rights. A vendor must transfer, as part of the *commoda rei*, rights of action acquired since the sale¹. Sureties could, on paying, require transfer of the creditor's rights. And there were many other cases. Where the transfer could be required as a matter of course, it might have been expected that a rule would appear under which the person entitled could proceed, without actual transfer, as if this had been made. It was formerly held that the law was in fact so, and the name *cessio legis* was applied to this automatic transfer. But there never was any such general principle. What happened was that in one case after another, partly by express enactment, partly by juristic *interpretatio*, a somewhat similar effect was brought about, by allowing the person entitled to a transfer to bring an *actio utilis* in his own name. There was no fiction of a transfer, no direction to the *iudex* to proceed as if the plaintiff had been appointed *procurator in rem suam*. The cases were not numerous. They began under Pius²: later Emperors added new ones, but even under Justinian, apart from ten or twelve sporadic cases, a person entitled to transfer of actions must see that he got it, otherwise he could not sue.

Of automatic transfer of liabilities there is less to be said. *Bonorum emptio* and *fideicommissum hereditatis* were dealt with by express legislation, and it will be remembered that liabilities incurred by a tutor in his pupil's affairs passed automatically to the pupil at the expiration of the *tutela*.

137. EXTINCTION OF OBLIGATIO. An *obligatio* may cease to exist from any one of many causes, which can be grouped as Involuntary and Voluntary. Of the first group may be noted:

Supervening impossibility, e.g. (*casus*) destruction of subject matter. This did not release the party liable if he was already *in mora*, or if it was imputable to him, e.g., due to his *culpa*, where he was liable for *culpa*.

Death. In a contract for personal service, death of a party is *casus*. Apart from this, death of the creditor ended the relation for

¹ D. 47. 2. 14. pr.

² D. 2. 14. 16. pr.

the future in *societas* and mandate, and altogether in *adstipulatio* and *iniuria*, and, till Justinian, it ended the widow's claim for her *dos*. Death of the party liable ended the relation for the future in *societas* and mandate, and altogether in *sponsio* and *fidepromissio* and in a mass of delictal obligations.

Capitis deminutio has already been sufficiently dealt with¹.

Lapse of time was in general no bar at civil law, till very late, though there were exceptional cases, but many praetorian actions were *annuae*. This matter will best be treated under Procedure.

Compensatio, set off, was not in strictness a mode of extinction, though it might so operate. This too will be discussed under Procedure.

*Duae lucrativae causae*². There was a rule that two gratuitous causes of acquisition could not concur in the same thing and the same person. Thus if a man had two gratuitous promises, or a promise and a legacy, of the same thing, and received it under one, he had no claim under the other, though if he received less in any way he could still claim the excess. It was only receipt of the thing itself which barred claim: receipt of the value under one gift was no bar to claim under the other. The rule is commonly put down to impossibility or, rather, *casus*: what has been received cannot be received again. The fact that the rule did not apply where one actual acquisition was for value, though the impossibility would be the same, is usually explained as an equitable relaxation: there should be a right to claim the cost. The rule is also sometimes explained as based on presumed intent of the donor. A gift once avoided in this way did not revive on alienation of the thing.

Confusio. If the position of debtor and creditor vested in the same person, e.g., where one became *heres* to the other, the obligation might be loosely said to be destroyed. In the particular case mentioned, it revived if the *hereditas* was sold as such³, and there were many limitations where the *confusio* affected only one of several joint debtors or creditors. Thus, *confusio* between creditor and surety did not destroy the principal debt.

Lex. There were some cases in which the law deprived a man of his right as a penalty, e.g., where a creditor seized property by force.

¹ *Ante*, § 32.

² *In*. 2. 20. 6.

³ *D* 18. 4. 2. 18.

138. Voluntary modes of extinction. Some of the foregoing are voluntary acts but they were involuntary extinctions, as the object of the transaction was not the ending of the *obligatio*. But, leaving out of account the arrival of a condition or term which, it had been agreed, should end the relation, there were three transactions of which the primary aim was the destruction of an existing *obligatio*.

*Solutio*¹. Performance or payment. The word *solutio*, *solvere*, is used in the Digest, and probably also by the classical jurists (though this is disputed), to denote the performance of any kind of *obligatio*. But its primary meaning of loosening, and the fact that it is far more commonly applied to payment of money than to anything else, suggest an original much narrower meaning, the release of the debtor himself from the position of personal subjection which we saw to be in all probability the characteristic of early *obligatio*. In early times *obligatio* was usually for a fixed sum of money, and the release was by formal acts which survive in the formal acts of release, without performance, of historical law. These were not invented as modes of discharge without payment: they are what was left of the ancient principle, expressed here and there in the sources, that an *obligatio* must be discharged in the form in which it was set up. Payment alone did not in early days suffice. It is said that the word *solutio* is not applied in any genuine classical text to specific cases of return of a thing pledged, or lent or deposited, these obligations having been recognised only after the disappearance of the personal subjection expressed by the word *obligatio*. But in the classical law the point is no more than verbal.

Solutio must be of the whole debt, and in conformity with the liability, e.g., the terms of the contract. It might be by a third person, even unauthorised², except where it was a personal service, but it must be to the creditor or a person authorised by him, e.g., a *solutionis causa adiectus*. Payment to a *negotiorum gestor* was no payment till it was ratified. Of an indivisible *obligatio* a partial *solutio* was a nullity, e.g., of an *obligatio* to paint a picture or create a right of way: till all was done the whole could be sued for, and in such a case if several were bound each was liable for the whole whether a solidary *obligatio* had been intended or not.

An alternative *obligatio*, "to give *A* or *B*," was indivisible: it

¹ G. 3. 168; In. 3. 29. pr.

² D. 3. 5. 38.

could not be satisfied by giving half of each. If half of *A* was given and then all *B*, the half of *A* was an *indebitum*. In general, apart from agreement, the choice was with the party liable, and if, by mistake, both were given, one could be recovered, but it was not till Justinian that it was clear that, here too, the choice was with the payer¹. If one alternative became impossible, this was no discharge: The other was due: the party bound could not say that the thing which had perished was what he had meant to give. But alternative obligation must be distinguished from *facultas solutionis*. If, on the contract, one thing simply was due, *in obligatione*, but, either by some rule of law or by agreement, the party bound could if he chose do something else, e.g., pay to a *solutionis causa adiectus*, he was under no obligation whatever to do this other thing: it was a *facultas*. Thus if facts released him from the *obligatio* itself, e.g., it became impossible, he was not bound at all. It was a question of fact whether of the two possible renders both were *in obligatione* or one was only a *facultas*.

By agreement something might be substituted for what was actually due, *datio in solutum*. If the substituted render was duly made the *obligatio* was at an end, absolutely on the Sabinian view, which prevailed, though the Proculians gave only an *exceptio*. If, as it turned out, the substituted render was not properly performed, the old *obligatio* revived: some texts which give, instead, an *actio utilis ex empto* for the substituted thing, may be due to the compilers².

139. Novatio³. Extinction of an *obligatio* by substitution of another for it. The source of the original *obligatio* was indifferent, but in the law as we know it, the substituted *obligatio* was always by *stipulatio* (or, possibly the contract *literis*, so long as it existed). If, for instance, *A* had promised *B* something by *stipulatio*, and they afterwards agreed to treat the transaction as a sale, this was a valid new contract, but the old one still existed at civil law, though, no doubt, the facts would amount to a pact not to sue on it, giving an *exceptio pacti*. To bring a *novatio* into existence there must be

(a) an existing uncompleted transaction. This need not be absolutely valid, but it must be such as to create a legal right, natural, civil or praetorian.

(b) a new agreement by *stipulatio*, dealing with the same liability

¹ C. 4. 5. 10.

² D. 13. 7. 24. pr.

³ G. 3. 176-181; In. 3. 29. 3.

but having some change in form or content or parties. A *stipulatio* for an entirely different thing, though intended to be in substitution, was not a *novatio*, though it would amount to a pact not to sue on the old *obligatio*. The new *stipulatio* need not be absolutely valid, provided it was between parties capable of the form used. Thus a *stipulatio post mortem*, though not itself enforceable before Justinian, might novate and destroy the old obligation¹.

(c) *Animus novandi*. The history of this requirement is obscure. Under Justinian the intent must be clear on the face of the transaction. For Ulpian in the Digest the intent must exist but could be proved in any way². A generation earlier Gaius does not speak of this need at all. It may be that there was then no such requirement, but it is possible that at that time *animus novandi* was presumed: to displace it, it would have to be shewn that it was intended that both obligations should continue. It is, however, probable that at one time the second *stipulatio* for the same thing, if there was any change in it, always novated the first, and it is held by some writers that this was the rule throughout classical law.

The change of form would be the substitution of *stipulatio* for something else. The change of terms might in classical law be addition or removal of *dies*, condition or surety, but under Justinian other changes were admissible as not affecting the identity of the transaction, e.g., the amount of money, the extent of the right to be created, might be different. We are told that a conditional stipulation could not novate or be novated; which means that the *novatio* did not operate till the condition was satisfied.

Change of parties was the most important, i.e., where the debtor, with the assent of the creditor, promised the same thing to another person (practically assignment of debt) or a new debtor promised the same thing to the creditor. Commercial transactions are not usually gifts, and in this case the new debtor was usually a debtor of the old. There was a terminology in these cases which must be noted. Where *A* owed to *B* and *A*'s debtor *C* took over the obligation by *novatio*, this was *delegatio debitoris*, *C* was *delegatus*, *A* was *delegans*. But there were really two novations, for *C*'s debt to *A* was also novated. This was *expromissio*, *C* was *expromissor*. But these expressions were loosely used where *C* was not in fact a debtor at all.

¹ G. 3. 176.

² D. 46. 2. 2.

Novatio destroyed the old debt altogether: its liabilities were all ended, though they might be expressly renewed in the new contract.

As it appears in the texts, *novatio* was based on consent. *Litis contestatio*, joinder of issue in an action, had a similar effect in that it destroyed an existing *obligatio* and substituted another for it. Hence it may be called *novatio necessaria*¹, but it differed from real *novatio* in many ways. It was not by *stipulatio* and it did not rest on consent in any real sense. There was another difference of more importance. It did not put an end to all the liabilities which had arisen under the old *obligatio*: it did not, e.g., purge *mora*. Its very object was to enforce these obligations. And, one or two exceptional cases apart, the content of the new obligation was inevitably the same as that of the obligation it replaced.

140. Release. Voluntary discharge without performance. The governing principle was that obligations must be discharged in the form in which they were created, a principle of which we have seen that it is probable that in early law even performance did not dispense with it; the state of subjection (*obligatio*) endured till it was formally ended. But in historical times the principle governs only release without performance. The forms are:

Release *per aes et libram*². This was with the forms of *mancipatio*, differing in that the words were spoken by the party to be released and were declarations that he released himself from the obligation by copper and scales, accompanied by the handing over of an *aes*, the words varying no doubt according to the kind of *obligatio* released. It applied to judgment debts, to *nexum*, to *legata per damnationem* of *certa* (fungibles), to *sponsio* and possibly to all cases in which there had been liability to *manus iniectio*.

Accepti relatio. Release of contract *literis*, probably by entry in the debtor's codex, with the creditor's consent. Little is known of it.

*Acceptilatio*³. The most important mode of release, as it was that which applied to the most important of the formal contracts, the verbal contract. It was a question and answer. The party liable, stating what was due, said "*habes-ne acceptum*" and the creditor replied "*habeo acceptum.*" In later classical law, "*acceptum facis?*"

¹ *Post*, § 167; D. 46. 2. 29.

² G. 3. 173-175.

³ G. 3. 169-172; In. 3. 29. 1.

"*facio*" sufficed. It might cover more than one *stipulatio* or only part of what was due where the debt was divisible, but it must be absolute: it did not admit of *dies* or *condicio*. It destroyed the *obligatio* altogether, and thus, as it was an acknowledgment of receipt, if given to a surety it released the principal, any other sureties and all pledges.

Though it applied only to verbal contract, it could be made available in other fields by the expedient of first novating the old *obligatio* by putting it into the form of *stipulatio*, and then releasing this by *acceptilatio*. This was utilised in a process known as *stipulatio Aquiliana*¹, a device credited to Aquilius Gallus, of Cicero's time. Where two persons with complex relations between them desired to square or simplify their accounts they could work out the items and arrive at the balance due from one to the other. This balance being paid or otherwise arranged, each party would then make with the other this *stipulatio*, which was a comprehensive formula (it is set out in the Institutes), covering the claims which each had or might have against the other. This would novate all the claims and turn them into a single promise, for an *incertum*. These mutual stipulations might then be released by *acceptilatio*. No doubt the novating *stipulatio* might be more or less comprehensive, and perhaps it did not normally include delictal obligations.

Contracts *re* as they always involved something transferred, could not be annulled by a form. Acceptance of return would end them for the future, but the past could be wholly wiped out only by *novatio* and *acceptilatio*, though a mere agreement not to sue would give an *exceptio*.

Consensual contracts, so long as nothing had been done, could be released, as from their creation, by *contrarius consensus*. If something had been done or one party had been released by some event, the consent, though not absolute release, was effective in practice, as it gave an *exceptio*. Innominate contracts were on the same footing as partly performed consensual contracts.

All these are civil defences but we must also consider a praetorian defence which we have several times mentioned, the pact not to sue, *pactum de non petendo*, a civil defence, indeed, in delict, but elsewhere giving only an *exceptio*. In *bonae fidei iudicia* the result was much the same, since an *exceptio* of this kind need not

¹ In. 3. 29. 2; D. 46. 4. 18. 1.

be pleaded expressly in such actions. The chief question is: who might avail himself of such a pact where there were several parties? The pact might be so framed as expressly to limit it to the person making it, in which case it could not be used even by his *heres*, and there might be less complete limitation. Pacts so limited were said to be *in personam*¹, but, normally, *pacta* were *in rem* and their use by other parties to the obligation was governed by the rule that any other person liable could use such a pact, if, having paid, he would have a claim to reimbursement from the actual party to the pact. Unless it could be so used the original pact would be illusory. Thus *socii* could use each other's pacts, and surety his principal's, but not vice versa. The texts discuss many difficult cases, much of the elaboration being due to Justinian. The matter is further complicated by the fact that in some cases where the pact was not available to the person actually sued, the *exceptio doli* was given, but it is not easy to find the principle. Similar rules were applied between creditors: one could be met by a pact made with another only if there was a right of contribution between them, so that, apart from this, the other would benefit.

Pacts for third parties were no more valid than attempted contracts, and a pact with *A* that *B* should not be sued was of no value. But there were some exceptions with which we shall not deal.

141. PLURALITY OF PRINCIPALS. JOINT OBLIGATION². Where there was a transaction with more than one party on one side or both sides, unless the transaction was indivisible, the general rule was that the obligation was divided between them: each could sue or be sued in proportion to his share. But there were circumstances, apart from indivisibility, in which each of the parties might be liable in full. Of this liability there are three types.

(a) Several were liable to the penalty for a joint delict. Here each was liable in full (*in solidum*) and action against, or payment by, one, had usually no effect on the liability of the others. With this type we are not here concerned.

(b) Several were liable or entitled, each *in solidum*, under an obligation, but the thing was due only once. Satisfaction by, or to, one of those liable, or entitled, ended the whole obligation, and action by one of the joint creditors, or against one of the debtors, not only "novated" the obligation between the actual parties, but

¹ D. 2. 14. 7. 8.

² In. 3. 16; D. 45. 2.

destroyed it altogether as against the others. This relation is commonly called *correality* (*correi debendi vel credendi*).

(c) Several were liable or entitled, each *in solidum*, but the thing was due only once. Any form of satisfaction by or to one ended the matter altogether, but the bringing of an action did not, though satisfaction of the judgment did. This is commonly called simple Solidarity.

Correality was in general created by consent of the parties, and the name is sometimes confined to cases in which it so arose. But there were others. A testator might impose this liability on his *heredes*, in respect of legacies. *Contutores* were so liable. Principal and *institor extraneus* were so liable. There was legislation enforcing this liability on slave-dealers and *argentarii*. Surety and principal were on this footing¹. There were other cases, but the principle is always the same and we shall deal only with correality arising by consent. It might be created in any contract, and, apart from formal contract, in any way. But it was essential that the obligation be identical. The mode for *stipulatio* is stated in the Institutes. Of several stipulators (*correi credendi*, active correality) each asks the debtor and he answers once for all. Of several promisors (*correi debendi*, passive correality) the creditor asks each and they answer together. This, or something of the sort, is indeed practically the only way in which it can be one *stipulatio* for all. If the question and answer were made separately with each, these would be distinct stipulations. If the *stipulatio* with several parties was, as was usual in later law, embodied in a *cautio*, the point might not be so clear, and it was provided that the *obligatio* was divided unless the *cautio* expressly provided for correality².

The important characteristic of these obligations was that action between any two of the parties novated the whole *obligatio* and released all the others. The same effect was produced by any event which destroyed the debt as between any pair, *acceptilatio*, *novatio*, etc. A pact not to sue did not destroy the *obligatio*, and thus did not release the others unless, as we have seen, there was a right of contribution, so that the pact would be useless unless others could plead it. But it must be the debt that was destroyed, not the debtor. The fact that one debtor died without *heredes*, though it obviously ended the claim as against him, did not affect the liability of the

¹ P. 2. 17. 16.

² D. 45. 2. 11. 1, 2.

others. There are, however, difficult cases which we shall not discuss.

Justinian put an end to the chief characteristics of correality by providing that *litis contestatio* against one should not in future release others, but this did not affect release arising from other causes¹.

The question arises whether, if one debtor had paid, or one creditor received payment, there was any liability or right to contribution on the part of the others. It is generally held that correality gave no such right, but did not exclude it if it existed on other grounds. In fact, it usually would exist. Correality was not ordinarily created without some previous dealings. The parties would usually be *socii* (if only for this affair) or common owners or joint *heredes*, and here there was always contribution. And correal debtors not infrequently became sureties for each other (*fideiussio mutua*) and this, as we shall shortly see, gave a similar right.

Simple solidarity differed from correality in that action between one pair did not of itself destroy the obligation as against others, and this distinction disappeared under Justinian. There seems no clear case of such solidarity on the side of the creditor: it was always passive solidarity, and it is not easy to determine the principle which put a relation into this class. Apart from *dolus* and *metus*, governed by the Edict, there were the liabilities of *contutores* under the *actio de rationibus distrahendis* and a group of contractual and quasi contractual relations where there was an obligation to pay compensation, as opposed to a penalty, for joint wrongdoing in the transaction², covering in fact almost the whole field of the relations giving a *bonae fidei iudicium*. What is the basis of the distinction between these and correal cases, leading to the result that while in correality action released, here only satisfaction did? The orthodox answer, at least till recently, has been that in correality there was only one thing due and only one obligation while here one thing was due but there were distinct obligations. This, however, is discredited, first because some texts speak of several obligations in correality, and sometimes the obligation must have been distinct, e.g., where one was conditional and the other not, which might often happen, and, secondly, because no reason has

¹ C. 8. 40. 28. 2.

² E.g. *Tutela* (D. 26. 7. 18. 1); *Mandate* (D. 11. 6. 3. pr.).

ever been shewn why there should be several obligations in a joint breach of duty under a contract, and only one in making the contract. On the whole, the better view seems to be that there was no fundamental distinction, that, in principle, action ought to have been released here also, since it was *eadem res*, and the contrary rule was an equitable relaxation, recognising the fact that where there was a wrong done a wrongdoer ought not to be free from liability till it was put right. Some of the relaxations are no doubt classical, but most of them are probably Byzantine. And the question is complicated by the difficulty of determining exactly the conception of *eadem res*.

142. SECURITY FOR DEBT. It seems best to treat this topic at the end of the *ius rerum*, since it involves the discussion of relations both *in rem* and *in personam*.

When a man engages in business with another in such a way that the acts of that other may cause him loss, it is a natural precaution to secure some kind of guaranty, and, the more primitive the community, the cruder and more drastic these precautions will be. Before the growth of a scheme of contract and orderly judicial procedure, we have seen that security was taken over the person of the debtor: in *nexum*, however we analyse it, the lender had the right to seize the debtor at any rate, even if he could not get his money. But this security over the person, though it survived, in a certain sense, through the classical law (for the right of seizure under a judgment, though not without one, still existed) was very uneconomic, and the forms of security which we have to consider were of a different type. They were of two kinds, the holding of property as security (real security), and the taking of accessory undertakings from persons willing to put their credit at the service of the debtor (suretyship, personal security).

Real Security. In its most primitive form this was the handing-over of something to the creditor, to be returned when the obligation was fulfilled, and forfeited if it was not, often the only remedy. A slightly more refined form appears in early procedure in the institution of the *Praes*, who gave his undertaking to the Praetor, supported by a pledge of his lands, for the production, when the case was decided, of the disputed property, or for the payment of the sum forfeited by way of penalty by the loser. We shall discuss this in connexion with the *legis actio*.

In ordinary private life the earliest form of real security that we need consider was *fiducia cum creditore*¹, already mentioned. It was a transfer of the ownership under a *fiducia* to reconvey it if and when the debt was duly paid. The *fiduciarius* was owner with all rights of ownership, but he was bound to exercise them within the terms of the bargain. But this was matter of *obligatio*, and thus, if he sold before the debt was due, or in any other way not provided for, the sale was good and the buyer had a good title, though the fiduciary incurred liability in the *actio fiduciae*. The creditor must not make profit out of the thing and must set off receipts against interest due, and then against the debt, and, conversely, could add to the debt his expenses and the cost of improvements. He must not damage the property and must restore it when the debt was paid. Any balance on sale, over what was due, must be paid to the debtor. If the debtor sold, and paid off the debt, the property must be conveyed to the buyer. An agreement that the creditor was never to sell was void: he could still do so on giving notice. But he might not buy it himself, free of the *fiducia*, even *per interpositam personam*. It might be agreed that after a certain time it was to be his absolutely (*lex commissoria*) but this and the imperial legislation on the right of sale and foreclosure, will be discussed in connexion with the simpler forms of security, *Pignus* and *Hypothec*, to which they are equally applicable. These other forms of security, in existence from the last century of the Republic, did not supersede *fiducia* altogether, on account of the extreme security which that form gave to the creditor. We may remember that *fiducia* occurred only in connexion with *mancipatio* and *cessio in iure*.

143. *Pignus* and *Hypothec*² (the contractual aspect of which has already been dealt with). When the Praetor protected possession, by interdicts, it became possible to give security by transferring, not ownership, but mere *possessio*. This gave no power of sale except by express agreement, till the later classical law, which implied such a power unless it was expressly excluded. The debtor was better protected than in *fiducia*, for a sale not in accord with the agreement would be void. Here, as in *fiducia*, the *res* passed to the holding of the creditor, unless, as was not unusual, he allowed it to remain with the debtor, *in precario*. But there was yet a further stage. It was possible to agree that the creditor should

¹ *Ante*, § 100.

² G. 2. 64; P. 2. 5; In. 3. 14. 4; D. 20.

have possessory rights, so that he could take possession whenever he liked, and from any holder, but, for the time being the thing was left with the debtor. This kind of agreement ultimately acquired the name of *hypotheca*, *pactum hypothecae*, but, while the name may be Byzantine, the institution itself was in full operation in the early days of the Empire. It may be borrowed from Greek law, which had a similar rule, or it may be a natural evolution from *pignus* subject to *precarius*. Its earliest application was for rent: a farm tenant might agree that his *res*, all *bona inuenta et illata* and his crops should be security for his rent¹, and the landlord had an *interdictum Salvianum*, to take possession of them when rent was overdue, an interdict only later made available against third parties. But there was an *actio Serviana*, to recover them from anyone. Similar agreements were made for urban tenancies, but there was here no *actio Serviana* and perhaps no *interdictum Salvianum*. But, early in the Empire, there was an analogous *actio quasi Serviana*, or *utilis Serviana* which applied to all hypothecs and came, at an uncertain date, to be called the *actio hypothecaria*. There was no legal difference between *pignus* and *hypotheca*, only the *de facto* difference that in *hypotheca* the creditor had not taken the *res*.

The creditor might realise his security by sale so soon as the debt was due. He could buy from the debtor, but, for obvious reasons, was not permitted to sell to himself, even *per interpositam personam*. The classical law allowed the debtor to agree that the property should vest absolutely in the creditor if the debt was not paid by a certain time (*lex commissoria*). Apart from this, there was no "foreclosure" till the third century, when *impetratio dominii* was introduced². On application when the debt was due, valuation, and a year's delay, the creditor received praetorian ownership, in full discharge of the debt, in any case, and a liability to pay any excess to the debtor if the valuation exceeded what was due. And there was still a right to redeem till *usucapio* was complete. Early in the fourth century the *lex commissoria* was forbidden and, under Justinian³, an elaborate scheme to protect the debtor, was introduced. There might now, indeed, be sale, even though excluded by agreement, after notice given three times. Any excess on a sale went to the debtor, the creditor retaining a claim for any deficit. But all sale involved notice and long delay. If there was then no

¹ G. 4. 147.

² C. 8. 33. 1.

³ C. 8. 33. 3; D. 13. 7. 4.

purchaser, a time was fixed for payment, and then a decree giving ownership would issue. But there was a right of redemption for a further two years.

The normal subject of pledge was a thing owned, but any right which could be alienated could be pledged. There might be pledge of a debt or of a right of way, or even what is known in our law as a "floating charge," a pledge of stock in trade which applied to new stock as it came in and ceased automatically to apply to stock sold in the way of trade.

Though *pignus* and hypothec are almost different names for the same thing, there were *de facto* differences. Hypothec was used mainly for land, which cannot be removed. A thing could be pledged (*pignerata*) only to one, but successive hypothecs might be created over a thing. There was no fraud in this but it was the offence of *stellionatus* to give a hypothec without declaring existing hypothecs. Rules of priority were needed, and the fundamental rule was that the earliest hypothec had priority even though a later hypothecary had taken possession. But this was modified in three ways. Certain hypothecs were given special priority, e.g., that of the Fisc for State debts and, under Justinian, that of a woman for her *dos*. Further, there was *successio in locum*. If money was advanced to pay off a charge and a pledge agreed for, or a later charger himself paid off an earlier charge (*ius offerendae pecuniae*) the payer stepped into the shoes of the earlier charger even though there were intervening charges¹. And Leo provided (A.D. 472)², that a hypothec publicly registered, or made before three witnesses, in a special form, should have priority.

Any hypothecary could sell, and the sale would destroy later hypothecs (the holders being entitled to any surplus over what was due to the seller), but earlier hypothecs were unaffected. In like manner, any hypothecary could gain possession by the *actio hypothecaria*, but not from the holder of an earlier charge.

Besides agreed hypothecs, there were tacit hypothecs, imported by law in to the transaction, e.g., that of the Fiscus for taxes and later for all debts, that of wards over the property of their guardians, that of widows for *dos*, and others, many of them being due to Justinian. There were also hypothecs created by courts of law, but these we need not consider.

¹ P. 2. 13. 8; D. 20. 5. 5.

² C. 8. 17. 11.

A hypothec might be over a specific thing or specific things, ordinary pledges of property, the tacit hypothec of one who had lent money for repairs over the house repaired, and others, or it might be general, over a mass of property. Such were that of the *Fiscus*, that of a legatee over the property of the deceased and so forth. The distinction does not coincide with that between express and tacit hypothecs.

144. PERSONAL SECURITY. This is the undertaking by a third person (surety) of a responsibility accessory to that of the principal debtor. The earliest forms of it of which we know anything are the *Praes* already mentioned and the *Vas* who undertook responsibility for the appearance of a party, and in both these cases the liability was rather in substitution than accessory, and involved real security as well, in the case of the *Praes*. Both of these disappeared with the *legis actio* system, their places being taken by *sponsores* who promised by *stipulatio*. Whether these *sponsores* promised alone or as accessories to a promise by the party is not quite clear, but in any case there came into use before the introduction of the formulary system of procedure, a form of suretyship in ordinary legal transactions called *Adpromissio*¹, in which the surety gave, by *stipulatio*, an undertaking accessory to that of the principal debtor. These *adpromissores* might be either *sponsores*, the oldest form, *fidepromissores* or *fideiussores*. The words used in each form are given by Gaius and they express the fact that the promise is accessory to another promise and is for the same thing. *Sponsio* and *fidepromissio* could be used only to guarantee promises by *stipulatio*, and their antiquity is shewn by the fact that the liability did not pass to the *heres*. The special antiquity of *sponsio* is shewn by the fact that a *lex Publilia* gave a special remedy (probably only if he had paid *per aes et libram*) to a *sponsor* not reimbursed within six months. The remedy was *manus iniectio*, ultimately replaced, as usual, by an action for twofold damages. It was thus older than the *actio mandati*, the remedy in the other cases. *Fideiussio* though itself always by *stipulatio*, could be used to guarantee obligations of any kind, and the *heres* was liable.

As *adpromissio* was accessory, it could not be for more than the principal debt, though it might be for less, and if made for more was absolutely void. But as in very early times suretyship was not

¹ G. 3. 115-127; In. 3. 20.

accessory to, but in lieu of a liability of the principal, we get the curious rule that there might be valid suretyship where there was no enforceable principal debt at all, e.g., where the main debt was *post mortem stipulatoris*, or by a pupil without *auctoritas*, or the debtor has left no *heres*¹. And one who had knowingly become surety for a minor was bound notwithstanding the minor's right of *restitutio in integrum*. The fact that the debtor had no means and was one of those entitled to claim *beneficium competentiae* was no defence to his surety.

As an *adpromissor* was a mandatary, he could recover an indemnity from his principal up to the amount for which he had been authorised to be surety, which might be less than the debt, but as he had to pay precisely because the principal could not, this remedy might be illusory. As there was no necessary legal relation between two sureties for the same debt, he could not, on principle, claim contribution. This was remedied by legislation.

A *l. Appuleia* (about 200 B.C.) enabled joint *sponsores* or *fidepromissores* who had paid more than their share, to recover from the others.

A *l. Furia de sponsu*, a little later, provided that (i) *sponsores* and *fidepromissores* were released by lapse of two years from the due day, (ii) they were not liable for more than the debt divided by the number of sureties alive at the due day, and (iii) a creditor who exacted from one of them more than his share was liable to *manus iniectio*. This *lex* applied only to sureties taken in Italy, so that the *Appuleia* was still important.

A *l. Cicereia* required the creditor to state beforehand the amount of the debt and the number of *sponsores* and *fidepromissores*. A *praeiudicium* could be demanded within 30 days to decide whether this had been done: if it had not the suretyship was void. The *praeiudicium* shews that the *lex* was later than the introduction of the formula. The declaration was in practice made in *fideiussiones*, though these were of later introduction.

The further legislation applied to all three types.

A *l. Cornelia*, of Sulla, provided that, with some exceptions, no guarantee by any person for the same debtor in a single year was valid beyond the total amount of 20,000 sesterces. The rule had disappeared in later law.

¹ D. 46. 3. 95. 1.

Early in the Empire the *beneficium cedendarum actionum*¹ was introduced. A surety, before paying, could call on the creditor to transfer to him all actions against any person liable, the difficulty that, when he was paid, he had no actions left, being met by treating the surety as having bought the debt, not paid it. But the surety must see to it that he got his transfer before payment: if he did not he had no claim.

Hadrian introduced, especially for *fideiussores*, the *beneficium divisionis*. A surety was not to be liable beyond the amount of the debt, divided by the number of sureties solvent when the action was brought. But, as the obligation was *in solidum*, this limitation had to be expressly claimed.

145. Sureties and principal being equally liable, the creditor might choose which he would sue, though it was discourteous, and might be an actionable *iniuria*, to sue sureties without first asking the principal for the money, unless he was absent or notoriously insolvent. But, having sued one, his right was exhausted. It was *eadem res*: the *litis contestatio* had novated the *obligatio* and released the others. Even if he had sued for a part, under the *beneficium divisionis*, he could not sue again without relief, which however he would get as a matter of course. The difficulty might be avoided by varying the form, the surety promising "what cannot be recovered from the principal" (*fideiussio indemnitis*²). The principal must then be sued first but the surety was liable for any deficit. In late law sureties commonly agreed not to avail themselves of the bar by previous action. Justinian ended the difficulty by providing that where several were liable for the same debt, action against one should not *ipso facto* release the others. He further provided that the principal must be sued first, but if he was away and the sureties failed to produce him on demand, within a certain time, they could be sued (*beneficium excussionis, ordinis*)³.

Other forms of suretyship (we have already mentioned them) were:

Mandatum credendae pecuniae (so-called *mandatum qualificatum*)⁴. If *A* lent to *B* under mandate of *C*, and *B* did not pay, *C* must reimburse *A* under the mandate. The general principles were the same as in other cases of suretyship but there were differences

¹ D. 46. 1. 17.

³ N. 4.

² D. 45. 1. 116.

⁴ *Ante*, § 118.

due to the fact that it was by an independent contract under which the lender (*mandatarius*) owed duties to his surety (*mandator*). Thus suing the debtor did not release *mandator*: the contracts were distinct. *Mandator* was released if the lender had abandoned any rights against debtor: *fideiussor* could claim transfer only of such as still existed. *Mandator* could withdraw before performance. Whether the *ll. Cornelia* and *Cicereia* applied is uncertain.

*Constitutum debiti alieni*¹. If the *constitutum* did not supersede the original debt, as it might in praetorian law, action on it did not release the original debtor. As it was based on suspension of action, it so far differed from *fideiussio* that a *fideiussio* which failed for lack of form could not be treated as a *constitutum*. There was no *beneficium divisionis* till Justinian. The position as to the *leges Cornelia* and *Cicereia* is doubtful.

Receptum argentarii. This was very like *constitutum*. The only point to be noted is that it was binding even though the original debt was non-existent, no doubt for the sake of confidence in dealing with bankers, who presumably knew their clients' affairs.

It remains to consider the *sc. Velleianum*² (about A.D. 46). This prohibited women from engaging in any form of *intercessio* for another. *Intercessio* is wider than suretyship; it covers *novatio* or other step by which the debtor's *obligatio* is destroyed (privative *intercessio*) as well as suretyship, which leaves it unaffected (cumulative *intercessio*). It covers even undertaking an obligation for the benefit of a third party, himself not contracting. The senatus-consult, a generalisation of legislation against such acts on behalf of the husband, was widely construed. Though the defence was by *exceptio*³ (*scti. Velleiani*) the act was void, not admitting even a *naturalis obligatio*. The provision covered mandates to third persons to act as *intercessor*. If the woman's act, though void in itself, had destroyed the old *obligatio*, e.g., novated it, the Praetor revived this. There were some exceptions, e.g., where the woman deceived the creditor, who did not know that it was *intercessio*, where it was to save a father from judgment, to provide a *dos* for a daughter, etc.

Justinian greatly changed the law. Apart from altering the exceptions, he made the *intercessio* valid if the woman confirmed

¹ *Ante*, § 121.

² P. 2. 11; D. 16. 1.

it after two years, or was paid for it, or acknowledged in the document that she was paid. But there must always be a writing with three witnesses, and it must never be for the husband.

In classical law it does not seem that the protection could be waived, but these rules of Justinian open the way to this, and, in fact, in his enactment by which he allowed a mother to be tutor to her children, he required that she should waive the *Senatus-consult*¹.

¹ N. 118. 5.

CHAPTER XVI

ACTIONS. CLASSIFICATION. THE SYSTEMS OF PROCEDURE

146. We have now reached the third and last of the three topics expounded by Gaius—the law of remedies. Of the logical merits or demerits of this co-ordination of what is really adjective law, as the third element in a scheme in which both the others are substantive law, something has already been said and need not here be repeated.

The various duties and rights which make up a system of substantive law can hardly be said to exist as law unless some method of enforcement is provided. In a primitive community there is, indeed, no such method provided by the State, but even at that stage it is hardly correct to say that there is no protection at all, that the strong man, armed, holds his goods in peace, and no one else does. Even in primitive times a man must not do merely what is right in his own eyes: he must do what is right in his neighbour's eyes, or things will not go well with him. Every man must indeed protect his own interest, and there is no State machinery to assist him, but the whole weight of opinion, and especially that of the priestly caste, will be against the man who disregards the custom.

The first step towards legal protection of rights was the regulation of self-help. A man who had been wronged, in an age when all wrongs were personal, might lay hands on the wrongdoer, but he must do so only with the proper ceremonies, and in the presence of a public, at first, no doubt, priestly, authority who would see that all was in order. This was the original form of *manus iniectio*, a procedure which survived into historical times, considerably elaborated and restricted, serving in some cases the old purpose of pure self-help, but most prominent as a means of compelling obedience to a judgment when a dispute had already been determined by a court of law. If we may judge by other nascent civilisations, it was at a very early stage that there appeared a wise man, king, elder, priest, whose office it was to decide disputes. Reference to such a person is litigation, but it is not a necessary consequence

that the public authority should take steps to enforce the decision so given. In fact it is clear that this long remained matter of self-help: the fact that a judgment had been given was a justification of seizure by the wronged man, and *manus iniectio iudicati* was, even in historic times, the ordinary mode of enforcement of a judgment. By the time of the XII Tables there was a well developed system of legal procedure, known, at least in later days, as the *Legis Actio*, replaced towards the end of the Republic by the Formulary System, which in turn gave way, about the end of the classical age of law, to a system commonly called *Cognitio Extraordinaria*. This, modified from time to time, remained in operation under Justinian. These systems we shall consider in some detail, but a few words as to their main characteristics must be said now. In the *Legis Actio* the case was first brought before the magistrate, every step in the proceedings and all the utterances of the parties and the magistrate being prescribed for them, the ritual having been built up by the *pontifices* on the words of the Statute; every action having its own forms which must be exactly followed. It then went for decision to a *iudex* or *arbiter* (or to a standing tribunal), these referees not being lawyers, but chosen from an *album iudicum*, made up of *cives* of the better class. If the decision was for the plaintiff, and was not satisfied, it would be followed by seizure, *manus iniectio*, and ultimate enslavement.

In the Formulary System there was no ritual. The Praetor's Edict contained, besides his rules of substantive law, a number of model forms in which actions for various claims could be cast, and the parties stated the issue between them in one of these forms, varied so far as was necessary to raise the precise point, the Praetor approving; his business being not to see that they had stated their issue correctly—that was their affair—but that the issue did state an admissible claim. His function was thus far more important than in the older system: the formula was variable to suit the facts, very much at his discretion. He could give new actions and refuse actions where the Statute gave them. The formula when settled was written down, and the case was transferred, as before, to a *iudex* for trial and decision. The proceedings before the Praetor were *in iure*, those before the *iudex*, *in iudicio*. Judgment was still enforceable by seizure, but there was also a system of execution directly on the property of the defendant.

The third system, *Cognitio Extraordinaria*, essentially an administrative process, was on different lines. The whole matter was tried and decided by the magistrate or other official before whom it first came. There was no reference from *ius* to *iudicium*. There were written pleadings, but of course no instructions to a *iudex*. The mode of execution was also modified.

The words *Actio*, *Iudicium*, were used in several senses. *Actio* might mean either the process of litigation or the right to it—*actionem habere*. Also there was a wide early sense indicating any legal process for the enforcement of a right, not merely litigation, e.g., self-help by *manus iniectio*. Some texts shew a tendency to limit the word to the *legis actio* system, the word *iudicium* being used for the formulary system, but this latter distinction is not important for us. *Iudicium* means most commonly the second stage of the proceeding, the actual hearing, and when, in later law, there was only one stage, the name was applied to the whole process. It was also used sometimes, to denote a case heard by a *iudex*, as opposed to one heard by *arbiter* or *arbitri*.

147. CLASSIFICATION OF ACTIONS¹. The Law of Actions really covers two distinct topics, the classification of actions and determination of the question what particular action is appropriate in the particular case, which may be called the Law of Actions *stricto sensu*, and the description of the steps to be taken in an action, which may be called the Law of Procedure. As may be seen in the Institutes, Actions may be classified from many points of view, of which the following are the most important.

Actio in rem, in personam. In modern language, these are actions to enforce *iura in rem* and *iura in personam*, respectively. The typical *actio in rem* is *vindicatio rei*. In the early days of the formula, as we shall see more fully later, real actions were tried in a disguised form as actions *in personam*, by making a bet on the ownership and suing on the bet (*formula per sponsionem*) and this method continued long in use, the action being regarded as essentially a real action. But a direct *formula petitoria*², raising the issue of the *ius in rem*, was the most usual in classical law. There were many real actions other than *vindicatio rei*, e.g. *hereditatis petitio*, *vindicatio libertatis* (and *vindicatio in servitutumem*, which was not quite like an ordinary *vindicatio*), *vindicatio ususfructus (usus)*

¹ G. 4. 1-10; In. 4. 6.

² G. 4. 91.

and the *actiones confessoria, negatoria* and *prohibitoria*, which we considered in connexion with servitudes. There were also a number of praetorian actions *in rem*, e.g. *actio Publiciana, hereditatis petitio possessoria*, and *vindicatio utilis* which is found in many applications.

As actions *in rem* claimed a right in a thing and not a right against a person, and the *intentio* (statement of issue) did not usually mention the defendant, while that of an *actio in personam* commonly did, this difference came to be regarded as the sign of an *actio in rem*, and some actions *in personam* which did not in the *intentio* name the defendant, e.g., the divisory actions, are called by Justinian *actiones in personam in rem scriptae*. Conversely, the *actio negatoria*, denying a servitude did, in its *intentio*, name the defendant whose right was denied. It was not however as defendant that he was named, but in defining the limits of the ownership claimed, i.e., ownership free from any servitude vested in *X*, the defendant.

Actions *in personam* were very numerous. There were the various actions which we have had occasion to mention under the topic of *Obligatio*, and others, omitted by reason of their relatively small importance. Each of them had its distinguishing words in the *intentio* which we shall consider in connexion with the structure of the formula. Of the divisory actions, Justinian says that they are both *in rem* and *in personam*. This is a confusion: they contained *adiudicatio*, which had effect *in rem*, and they were based on common ownership, but in fact they are quasi-contractual.

The classification applied, strictly, only to those actions which on the face of them asserted a right, civil actions *in ius*, or praetorian actions which allege that a right would exist if a certain fact were assumed (*actiones fictitiae*) or allege a right or liability in someone, though not in the party (Rutilian *formulae*). But every action, even though the issue as formulated is purely one of fact, had a right behind it and might therefore be classed according to the nature of that right. Thus the *actio Serviana* of a pledgee really asserted a *ius in rem*, and we have seen many instances of actions *in factum* to enforce praetorian *iura in personam*.

148. *IUDICIA STRICTA* (*STRICTI IURIS* under Justinian), *BONAE FIDEI*¹. This classification seems confined to actions *in personam*, *in ius*, though in many respects the rules of real actions resembled

¹ G. 4. 62; In. 4. 6. 28.

those of *stricta iudicia*. The distinguishing mark of *iudicia bonae fidei* was that the statement of the issue contained the words *ex fide bona*, which enabled the *iudex* to take into account, without express statement, matters which, in *stricta iudicia*, would need to be expressly raised. Such points as *dolus*, *metus*, *pactum conventum*, which had to be raised expressly by *exceptio* in *stricta iudicia*, could be raised without this in *bonae fidei iudicia*. The same is true of all equitable defences, but not, e.g., of the *exceptio rei iudicatae* which has nothing equitable about it, and must be expressly pleaded in all actions where the defence of *res iudicata* was relied on, apart of course from cases of *ipso iure* consumption. We have already noted differences as to the effect of *mora*, as to *fructus* and interest, *pacta adiuncta*, and shall soon have to note differences as to the rule, *omnia iudicia absolutoria sunt*, and as to allowance of set off. We are told that, in *stricta iudicia*, the *interesse* was to be valued as at *litis contestatio*, but in *bonae fidei iudicia* as at judgment. But so many other facts affect the estimation of damages that this is rather an indication of a difference of attitude in the two groups of actions than a trustworthy guide in any actual case.

We have lists of the *bonae fidei iudicia* from various dates¹, which shew that the list was not constant. Some actions died out. Others, which had been *actiones in factum*, obtained a formula *in ius*, which often left the alternative formula *in factum* in existence side by side with it. One of these at least is a very late introduction. The actions on consensual contracts were *bonae fidei*. So were those on real contracts other than *mutuum*. But while it is fairly clear that for *commodatum* and deposit the *bonae fidei* formula had appeared early in the Empire, it may be that *pignus* gave only an *actio in factum* till late in the classical law or even later. The *actiones fiduciae*, *rei uxoriae* and *negotiorum gestorum* seem to have had the same evolution, the first two being obsolete under Justinian. Other *bonae fidei iudicia* were the divisory actions, the *actio tutelae* and the *actio praescriptis verbis*, this being a very late introduction.

Real actions seem to have resembled *iudicia stricta*. Delictal actions formulated *in ius*, e.g. *furti nec manifesti*, *e lege Aquilia*, do not appear to have been classed under either head. Both were regarded as purely penal, though under the *l. Aquilia* the damages included the value of the *res*. Pact was a complete defence in

¹ G. 4. 62; In. 4. 6. 28; Cicero, *de Off.* 3. 17. 70; *de Nat. Deor.* 3. 30. 74.

delict, and most of the other points in which the distinction was material could not arise in connexion with these actions. Actions formulated *in factum* were also outside the scheme, but we shall see that they were of two types, the distinction being of very similar significance.

Condictio was the most important of the *stricta iudicia*. The name is derived from the *condictio* of the *legis actio* (though there was in the later *condictio* no special requirement of notice) and its fundamental notion was readjustment of relations where one was unjustly enriched at the expense of another, as in *condictio indebiti*. It was characteristic of *condictio* that the statement of the issue (*intentio*) did not state the basis (*causa*) of the claim: it merely claimed that so much was due. Thus the action on a *stipulatio* for an *incertum* was not a *condictio* nor was the action to recover a legacy *per damnationem*: they were the *actio ex stipulatu* and the *actio ex testamento*¹, and both of these, in the *intentio*, set out the *causa*. Both these institutions and their remedies existed before the notion of *condictio* was applied to anything but *certa*, and the remedy for such a legacy, even of a *certum*, was not *condictio e lege Silia*, but *manus iniectio*. Though we speak of *condictiones* in the plural, there was only one action called *condictio* with many applications. Some of the cases within its scope had other names. Thus the strictly classical name for a *condictio certae pecuniae* was *actio certae pecuniae creditae*. The various applications of *condictio* have their appropriate labels and thus it may be said that *condictiones* are classified from two points of view. One set of names² refers to the facts which gave rise to the action, e.g. *C. ex furtiva causa*, (*furtiva*), *ex turpi causa*, *indebiti*, *ob rem (causam) dati (datorum)*, *sine causa*, *ex lege*, *ex poenitentia*, *causa data causa non secuta*, of which at least the last three are post-classical. The other classification refers to what is claimed and is of more interest. We find *condictio certi*, *certae pecuniae*, *triticaria*, *incerti*. It is doubtful whether any of these names is classical, and their application is not quite consistent. *Condictio certi*, sometimes used to denote any *condictio* for a *certum* is sometimes confined to *condictio certae pecuniae*. *Condictio triticaria* (*triticum*) which ought to mean *condictio* of a quantity, e.g. of grain, is also used to mean any *condictio certae rei*. *C. incerti* is a late introduction and the name is later still.

¹ G. 2. 213; D. 30. 33.

² D. 12. 4—13. 2; *ante*, § 124.

A text attributed to Ulpian, but probably interpolated, speaks of *condictio certi* as available wherever a *certum* is due¹, and instances legacy, contracts *re* and even the Aquilian action. Commentators call this *condictio generalis*. The Institutes² make *condictio* available as a substitute for the actions *in solidum* on contracts by a slave or *filius* (*quod iussu*, etc.). Here the claim would often be for an *incertum*. It may be the same *condictio*, and this involves a great widening of the notion since the action might be civil or praetorian, *bonae fidei* or *strictum*. There is much controversy.

149. *ACTIO CIVILIS, HONORARIA*³. The former were those given by civil law, i.e., by statute or juristic practice (e.g. the formula *in ius* on deposit, or the *actio praescriptis verbis*). The latter were created by the magistrate, usually the Praetor, but, as we have seen, in some cases the Aediles. Since the magistrate could not directly assert a right in law where none existed, he created three types of action, all designed to avoid this difficulty.

Actio fictitia. Here the *intentio* instructed the *iudex* to proceed as if a certain fact were true which, if it were true, would involve the existence of a right or liability. In the *actio Publiciana* he was to decide as if the *res* had been possessed for the period of *usucapio*. Actions by or against the *bonorum emptor* of a deceased insolvent were to be decided "as if he were *heres*," and we have dealt with many similar cases.

Actions with the Rutilian formula. Here one person was named in the *intentio*, the statement of the claim, as liable or entitled and the *iudex* was directed to order payment by or to another. Thus a *bonorum emptor* claiming a debt due to an insolvent, not dead, would sue in the form: "If you find the debt due to *X* (the insolvent), order payment to *Y* (the *bonorum emptor*)."

Actions *in factum*. Here the issue stated was purely one of fact, and the *iudex* was directed to condemn or absolve according as he found these facts or not. It is clear that in formulating these actions the Praetor exercised a great power. There was not here a mere alteration of one only of the elements making up a civil right: the magistrate was creating what right he would. Public opinion, especially that of lawyers, imposed the limits. As the decision turned on the facts alone great care was needed in formulation.

¹ D. 12. 1. 9.

² In. 4. 7. 8.

³ In. 4. 6. 3-12.

It would seem to follow that the *iudex* could consider nothing but these facts, and that any *exceptiones*, even equitable, must be raised expressly. This seems to be true in most cases, but there was a small group of *actiones in factum* in which the *iudex* was bound to condemn *in quantum bonum aequum videbitur*. These were, on this point, on much the same footing as *bonae fidei iudicia*; some of them, e.g. *rei uxoriae*, grew into such actions. Other instances of this group are *iniuriarum* and the action against a *iudex qui litem suam fecit*.

Though these three forms of action were devised by the Praetor, it sometimes happened that, for reasons which are not always clear, statutes adopted them. The *l. Papia Poppaea* gave *bonorum possessio* in some cases, and the resulting actions, though with this statutory basis, were *honorariae* in form. The so-called *l. Rubria* gave an *actio fictitia*¹.

It should be added that the name *actio in factum* is not always used in the technical sense of action formulated *in factum*. Thus the *actio praescriptis verbis*, which was *in ius*, is sometimes called *actio civilis in factum*.

The expression *actio utilis* is not applied in exact coincidence with any of the distinctions here mentioned. It was any action which was an extension, to an analogous case, of an existing action, usually a civil action, e.g. *actio utilis e lege Aquilia*, *vindicatio utilis*. But a praetorian action might be so extended: in one case at least an *actio in factum* was extended to new cases as an *actio utilis*². *Actiones utiles* were a praetorian notion, but many were introduced by the jurists after the Edict had ceased to make law, and many are no doubt post-classical.

IUDICIA LEGITIMA, IMPERIO CONTINENTIA (*QUAE IMPERIO CONTINENTUR*)³. This distinction applies only to the formulary system: there is no trace of it in later law, and the main characteristic of *iudicia legitima* was itself absent from the *cognitio*. *Iudicia legitima* were those brought within a mile of Rome (i.e. at Rome) between *cives*, before the *unus iudex*. The distinction has nothing to do with other characteristics of the action. A *iudicium in factum* was *legitimum* if within this definition: a *vindicatio* outside Rome was not. There is some controversy as to the exact meaning of the

¹ *L. Rubria* c. xx; Girard, *Textes*, 75.

² *D.* 13. 5. 19. 1.

³ *G.* 4. 104.

word *legitimum* here. It may be a reference to the XII Tables, or, perhaps more probably, to the *l. Aebutia*. Among the procedural points in which the distinction was important may be mentioned the following. *Iudicia imperio continentia* expired if not decided within the magistracy of the magistrate under whom they began: *legitima* were not time-limited at all, till a *l. Iulia*, under Augustus, limited them to 18 months from *litis contestatio*. Justinian limited the life of all suits to three years. But while in classical law the expiration meant destruction of the right, by the operation of *litis contestatio*, there was nothing under Justinian to prevent renewal of the action. The limit of time here considered had nothing to do with the time which barred a claim: it had to do only with the time for which a hearing might be allowed to drag on. A *iudicium legitimum* was ended by *capitis deminutio* of a party, subject however to *restitutio in integrum* in appropriate cases. *Adiudicatio* in a *iudicium legitimum* gave civil ownership: in a *iudicium imperio continens* it gave only praetorian ownership.

150. *ACTIONES PERPETUAE, TEMPORALES*¹. The first were not barred by lapse of time till the fifth century, when Theodosius limited actions to thirty years, leaving however a longer term for some privileged cases. Civil actions were normally *perpetuae*: such limitations as existed were due to express legislation. The *actio auctoritatis* was limited to the time of *usucapio*. The *l. Furia* limited action, against *sponsores* and *fidepromissores* who contracted in Italy, to two years. The *querela inofficiosi testamenti* was limited to a term varied from time to time. Action under the *l. Cicereia* was limited to thirty days. Praetorian actions *ad rem persequendam* were usually *perpetuae*. Such penal actions were usually *perpetuae* if merely in furtherance of a civil law rule, e.g. *furti manifesti*. Otherwise they were usually *annuae*, confined, that is, to a year of *dies utiles*. But the texts tell a confusing story. Some praetorian actions which on these principles we should expect to be *annuae* were *perpetuae*, and vice versa. The probable explanation is that many actions originally regarded as penal were treated in later law as quasi-contractual, and of these some were left *annuae* and some were made *perpetuae* by interpolation, and some, retaining their penal character have been made *perpetuae*, on no very clear principle. But the matter is obscure and controverted.

¹ G. 4. 110, 111; In. 4. 12. pr.

*ACTIO AD REM PERSEQUENDAM, AD POENAM PERSEQUENDAM*¹. Typical actions of the first type are *vindicatio*, *actio ex stipulatu*, *actio ex empto*, all being for the recovery of an economic interest. It is not however easy to say what characteristic made an action "penal." It was not enough that the damages might exceed the defendant's profit: that might happen in any action. On the other hand, it was not necessary that the damages should exceed compensation: the *actio doli* was penal, though it led only to compensation and the Aquilian action might do no more. Probably an action in the classical law was penal if its primary object was the repressing of a wrong and fixing blame on the wrongdoer, rather than the mere adjustment of property relations. It is quite possible that, as is held by some writers, all praetorian actions *in factum* were originally regarded as penal: this is certainly true of some of the actions later thought of as quasi-contractual. Such actions are the most direct expression of the magistrate's authority.

Penal actions were not available against the *heres* except, in some cases, to the extent of enrichment. Some of these are Byzantine, and it is possible that wherever this liability of the *heres* existed in classical law, the remedy was by means of another action, *ad rem persequendam*.

In many cases, e.g. *Rapina*, *lex Aquilia*, etc. the action covered both a penalty and compensation. These Justinian describes as *mixtae*, but this conception is certainly not classical.

Where several were jointly liable to a penal action, each was liable in full, and the fact that one had paid in no way relieved the others. We have already considered this rule and the exceptions.

ACTIONS TRANSMISSIBLE OR NOT TO OR AGAINST THE *HERES*². With a few exceptions (*adstipulator*, *querela inofficiosi testamenti*, wife's claim in *actio rei uxoriae*) actions *ad rem persequendam* passed to the *heres*, and, conversely, with a few exceptions (*sponsor* and *fidepromissor*) against the *heres*. Penal actions did not lie against the *heres* of the wrongdoer (apart from enrichment), but with a few exceptions (*iniuria*, *actio de mortuo inferendo*, etc.) they were available to the *heres*.

*ACTIO IN SIMPLUM, DUPLUM, TRIPLUM, QUADRUPlum*³. Apart from a liability *in duplum* for *infinitio* in a few cases, actions *ad*

¹ G. 4. 6-8; In. 4. 6. 16-19.

² G. 4. 112, 113; In. 4. 12. 1.

³ In. 4. 6. 21-27.

rem persequendam were *in simplum*. Some penal actions were *in simplum*, e.g. *doli*. Many were *in duplum*, e.g. *furti nec manifesti*; a few *in triplum*, e.g. *furti concepti, oblati*; and some *in quadruplum*, e.g. *furti manifesti*. There was no action for more than fourfold, though it is plain that the Aquilian action might in appropriate circumstances give more than four times the actual damage.

*ACTIONES QUIBUS IN SOLIDUM PERSEQUIMUR, QUIBUS NON SEMPER IN SOLIDUM PERSEQUIMUR*¹. The latter group would include cases in which the *condemnatio* was limited to a particular fund, e.g. *actio de peculio*², those in which it was limited to enrichment, and certain cases in which the defendant could not be condemned beyond his means to pay, cases of what has acquired the name of *beneficium competentiae*. The limitation was expressed in some such words as *duntaxat in id quod facere potest*, in the *condemnatio*. As the action destroyed the whole claim, security could usually be required for the unpaid balance. The principal cases were action on old debts against one who had suffered *bonorum venditio*, for a year, or against one who had made *cessio bonorum*, for ever; action against patron or ascendant, or a *miles*; *actio pro socio*; action against donor for the gift; against a wife or her *paterfamilias* for *dos*, or against a *vir* for its recovery, etc. There were differences of detail in different cases. The limit did not apply to delictal actions.

ACTIONES POPULARES, PRIVATAE. The latter were ordinary actions. The former were actions in which the public was more or less concerned, in which any one might sue, though in some of them there were preferences. In some cases the plaintiff kept the damages; in others he divided them with the State; in others he took nothing or only a small reward, but these last are actions *pro populo* and are not expressly called *actiones populares*. There were many of these but they dealt mainly with breach of local bye-laws and the like, and were unimportant in private law. Of the others may be cited *sepulchri violati*, *res suspensae* and some cases of *res deiectae*. They were all penal and most were praetorian. They were usually *annuae*. They were not available against the *heres*, and, as they did not represent any right in the plaintiff till they were actually brought, there was no question of transmission to the *heres* or of representation in the litigation.

ACTIONES DIRECTAE, ADIECTITIAE QUALITATIS. The latter term is

¹ In. 4. 6. 36.

² Ante, § 122.

not Roman, but is convenient to denote those actions in which *A* was liable for *B*'s act. Such were noxal actions, the actions on contracts by a slave or *filius* or *institor*, the *actio ad exemplum institoriae* in mandate and the action against *nautae caupones stabularii*. It is to be noted that the name *actio directa* is used in other senses, e.g., as opposed to *utilis* (*actio directa, utilis e lege Aquilia*) and as opposed to *actio fictitia*. *Vindicatio* is called the *actio directa* as opposed to the preliminary *ad exhibendum*. The word is not commonly used to indicate an opposition to *actio contraria*: the usual expression here is *actio principalis*.

151. Passing to the Law of Procedure properly so called, we have now to consider the three systems of procedure, already briefly noticed, which appeared in historical succession in Roman Law.

The *LEGIS ACTIO*¹. As the name shews, this system was regarded as based on the XII Tables, the statute *par excellence*, where, in fact, the procedure is set out. But the Tables contained probably little that was new in the matter: the real origin is customary. There were many *legis actiones*: each wrong had its appropriate *actio* devised by the pontiffs, and we are told by Gaius that the slightest deviation from the prescribed form involved loss of the action. But though there were many actions, they were all cast in one or other of five forms which Gaius calls *modi lege agendi*: *Sacramentum*, *Iudicis arbitrive postulatio*, *Condictio*, *Manus iniectio* and *Pignoris capio*.

*Sacramentum*². This mode "*generalis erat*": it was to be used if no other was prescribed. It might be used either as an *actio in rem* or as an *actio in personam*. It is for historical purposes the most important of the modes: many of the rules in the later law of procedure are to be explained only by reference to their origin in *sacramentum*.

The first step was *Vocatio in ius*, summons to court, obedience to which could be compelled, for it was a feature of this procedure that it could not be carried out unless both parties co-operated. In an *actio in rem*, e.g., a claim of a slave, the claimant said: "*Hunc ego hominem meum esse aio ex iure Quiritium, secundum suam causam sicut dixi. Ecce tibi vindictam imposui*," touching him with a wand. This *vindicatio* was followed by a similar counter *vindicatio* by the other; this whole process being called *manus consortio*. Then

¹ G. 4. 11-30.

² G. 4. 13-17.

the Praetor ordered both to stand aside: "*Mittite ambo hominem.*" The first then called on the other to state the ground of his claim: "*Postulo anne dicas qua ex causa vindicaveris.*" He replied, "*Ius feci sicut vindictam imposui.*" Then the first said, "*Quando tu iniuria vindicasti sacramento*" (50 or 500) "*te provoco,*" the amount being fifty *asses* if the *res* is less than 1000 *asses* or it is a question of liberty; in other cases 500 *asses*. After a counter challenge the money was deposited or security for it given to the magistrate, by a *praes*, on behalf of each (*praedes sacramenti*). Interim possession was awarded to one party who gave security to the other for the *res* and interim profits (*praedes litis et vindiciarum*). The next step was the appointment of *iudex*, at first at once, but, after an early *l. Pinaria*, thirty days later, giving an opportunity of coming to terms. The *iudex* tried the case on the third day from his appointment, i.e., the next day but one (*dies perendinus*). He did not condemn or absolve, but issued a *sententia*, that the *sacramentum* of one or the other was *iniustum*. That party forfeited his *sacramentum* to the State, which recovered it from the *praes*, by selling the pledged land, if necessary. If the successful party was not the interim possessor, he in like manner could recover the *res* or its value from the *praes*.

The name *sacramentum* suggests a religious basis: probably at one time there was an oath, the money being an expiatory offering. The *rex* probably presided till the expulsion of the Tarquins: that event transferred the duty to the *consul*, and the *l. Licinia* (B.C. 367) transferred it to the Praetor. In a province, the *praeses* presided, and where peregrines at Rome were concerned, the *praetor peregrinus*, after the introduction of that officer in B.C. 240. Where the subject matter was land, the *manus consortio* at first took place on the spot (*ex iure*) but in historical times there was only a fiction of going to the spot and returning with a turf as a symbol, over which the *manus consortio* was carried out, *in iure*.

When *sacramentum* was brought to enforce an obligation, there was no *manus consortio*, but an assertion and denial of the claim, followed by the procedure of *sacramentum*, but with no question of interim possession. If the amount was a *certum*, execution could proceed: if *incertum*, there was a further *arbitrium litis aestimandae*, to determine the amount.

If, from any cause, the *legis actio* was not completed in one day, security was given for reappearance, by the *vades* already mentioned (*vadimonium*) and the same machinery was used to secure attendance on the day of the hearing before the *iudex*. If however this also took more than one day, adjournment was always to the third day, *dies perendinus*, but there was no need for security: if one party had not appeared by noon on the day fixed, judgment went against him by default. The form and amount of the security given by the *vades* differed according to the nature of the claim, but the details on this matter are doubtful.

152. It will be noted that though one party began the procedure, there was really no question of plaintiff or defendant, at least in real actions. Both were claimants and each must prove his *sacramentum* to be *iustum*. But in fact the *res* would be left with the interim possessor, if the other party did not prove his case.

Since co-operation was essential, the question arises what happened if the party summoned, brought to court, refused to take the formal steps. There could be no judgment. In real actions the property would remain with the holder, though there was probably machinery, now unknown, by which a party could be compelled to act. In other cases the refusal may have been treated as a confession, but the point is uncertain.

The formal words of jurisdiction "*do, dico, addico*"¹ could not be spoken except at the proper place and on lawful days. Some days were wholly available, *dies fasti*, some wholly unavailable, *dies nefasti*, some partially available, *dies intercesi*, and some available if the *comitia* did not meet. And the proclamation of a *iustitium*, in a national crisis, made all proceedings impossible.

We have spoken of the reference as being to a single *iudex*, but this was not the only possible tribunal. It has been maintained, but it is unproved, that at one time the Pontiffs or one of them sat in judgment. It seems that if the matter was one involving expert knowledge or a visit to the spot, as in *iudicium finium regundorum*, the matter went before an *arbiter* or *arbitri*. Where *peregrini* were concerned (and, as *leges* did not apply to *peregrini* except expressly, this was possible only under special treaties) the case was tried by *Recuperatores*. These were either Romans or members of the peregrine community, according to circumstances. They were not

¹ G. 4. 29; Varro, de ling. lat. 6. 30.

drawn from any particular class, as were *iudices* and *arbitri*, and there were provisions for special celerity in their proceedings.

In the latter half of the Republic there was a standing tribunal, the *Centumviri*, to which were referred *hereditatis petitio*, claims of *tutela* and some other actions. The members of the court were chosen so many from each of the local Tribes. Its name seems to be only an approximation, indeed its numbers varied from time to time. It sat sometimes as one court, sometimes in sections according to principles not well known.

Another standing tribunal, the *Decemviri stlitibus iudicandis*, of somewhat later origin, which tried certain questions of status, was merged in the *centumviri* by Augustus.

153. *IUDICIS ARBITRIVE POSTULATIO*. Little is known of this action. There was an application to the Praetor in the form: "*Te praetor iudicem (arbitrumve) postulo uti des*," and Gaius seems to say¹ that it covered some of the field of *condictio*, i.e., of actions *in personam* for a *certum*. It is generally held that the *iudex* gave not merely a *sententia*, but a *condemnatio*, an actual order, and it has been conjectured that the main application of the action was to cases which did not admit of simple yes or no, e.g., *arbitrium litis aestimandae* and the divisory actions, though it seems also to have been available for claims to *certa*. Though later than *sacramentum* it was probably in existence at the time of the XII Tables.

*CONDICTIO*². This, the last of the *legis actiones* to be introduced, was created by a *l. Silia* for claims for *certa pecunia*, and extended, not long after, by a *l. Calpurnia*, to any other claim for a *certum*, both *leges* being probably of about the middle of the third century B.C. Gaius asks why it was introduced, as *sacramentum* and *iudicis postulatio* covered the ground. It may be that it was to provide a simpler remedy for the new contract *verbis*. It avoided the forfeiture to the State and the need for obtaining *praedes*, not always possible for a poor man. Its name, *condictio*, which Gaius tells us means *demuntiatio*, expresses one of its main characteristics, a notice to appear on a certain day and receive a *iudex*. Whether this took the place of *in ius vocatio* or was notice in court, as seems more probable, possibly mutual, after *in ius vocatio*, is uncertain. Apparently it was available for any claim of a *certum*, whether a fixed penalty for a wrong or a contractual debt, but this last became

¹ G. 4. 12, 20.

² G. 4. 18-20.

its principal field. It seems to have led up, not to a mere *sententia*, but to a *condemnatio*.

The *actio certae pecuniae creditae* (*condictio certae pecuniae*) of classical law, which covered exactly the field of *condictio e lege Silia*, is no doubt descended from it. As, in that action, the plaintiff could require a penal *sponsio* of one third of the sum in dispute¹, it is supposed that this incident is derived from the old *condictio*. Though almost a matter of course, it was not inevitable, as *sacramentum* was, and it differed also in that the profit went to the successful party, not to the State. But, as in *sacramentum*, the risk applied to both: the plaintiff had also to promise one third if his claim was unfounded (*sponsio et restipulatio tertiae partis*). It is not clear whether the amount of the *sponsio* was added to the claim or separately claimed in addition, or whether action brought on the *sponsio* was treated as decisive of the main issue. There is no evidence of any such *sponsio* under the *l. Calpurnia*.

In classical and later law, the plaintiff, in certain actions, was allowed to put the defendant to his oath as to the truth of the claim (*iusiurandum necessarium*). This will be discussed later: it is very ancient, and may have been first employed in this action.

154. These three modes of *legis actio* were alike in that they were litigation, reference of a dispute for decision. The other two were, *prima facie*, of another type, modes of actual enforcement of a right, regulated self-help.

*MANUS INIECTIO*². This was the seizure of one against whom there was a claim. It was no doubt the oldest *legis actio*, indeed the primitive process, self-help. Its earlier phase has been considered: we have now to describe it as it appeared, in a more elaborate and regulated form, as a *legis actio*.

Manus iniectio was of three types, *iudicati*, *pro iudicato* and *pura*. *Manus iniectio iudicati*, i.e., primarily at least, under a judgment, involved the production of the person to be seized, before a magistrate. The plaintiff then said: "*quod tu mihi iudicatus es sestertium X milia quandoc non solvisti, ob eam rem ego tibi sestertium X milium iudicati manus inicio.*" The person seized might not personally raise any defence: if one was made it must be by a *vindex*, against whom the further proceedings would go. We know little of these, but if he failed he was condemned *in duplum*. The

¹ G. 4. 171.

² G. 4. 21-25.

defence could not be on the ground that the judgment was wrong: it was not an appeal. It must be on some such ground as that the judgment was irregular, or had been satisfied, or that there was no judgment. If no *vindex* appeared, the debtor was *addictus* to the creditor, who might keep him in a private prison for sixty days, during which he could always get release by satisfying the judgment (*iudicatum facere*) or otherwise coming to terms. On three market days he must be publicly produced and the amount of the debt proclaimed. Debtors not redeemed "*capite poenas dabant aut trans Tiberim peregre venum ibant*," which seems to mean "were killed or sold into foreign slavery." If several creditors were concerned "*partis secanto: si plus minusve secuerint, se fraude esto*"¹. The Romans, in times when this had long been obsolete, understood this to mean that they might cut him in pieces without liability if one cut more or less than his share, but it seems that there was no record of this ever having been done. It might mean that the estate was sold, any creditor selling what he liked, and *capite poenas dare* need mean no more than enslavement.

A *l. Poetelia* (B.C. 326)² provided that debtors might not be chained or imprisoned, but were to pay, not with their persons, but with their property. As seizure still continued, this is supposed to mean that they could not be killed or sold or imprisoned, but must be allowed to work out the debt.

Manus iniectio, called *iudicati*, applied to other cases, e.g., to one who admitted liability (*confessus*) and perhaps to *nexus*. Statutes extended it to other cases, with the same incidents, under the name *manus iniectio pro iudicato*, e.g., the *l. Publilia* to a *sponsor* not reimbursed within six months, the *l. Furia de sponsu* against a creditor who had exacted by action more than his share of the debt from a *sponsor* or *fidepromissor*, perhaps also cases under the *l. Aquilia*. Though, nominally, the incidents were the same, there was really a considerable difference. In judgment, *confessio*, and even in *nexum*, the basis of the *manus iniectio* was a single easily proved fact. In the other cases it was more complicated, with an obvious burden of proof on the seizer. In fact this *manus iniectio* was little more than an ordinary action, begun in an unusual way with the further complication, to discourage groundless defences,

¹ XII Tables, 3. Girard, *Textes*, 13.

² Livy 8. 28; Varro, L. L. 7. 105.

that the defendant could not himself act but must find a *vindex* prepared to undertake double damages in case of failure. There was a further extension called by Gaius *manus iniectio pura*, in which the defendant might be his own *vindex*, for instance, under the *l. Furia testamentaria* against a legatee who took a legacy above 1000 asses, and the *l. Marcia*, against usurers. There is, however, doubt in some cases of *manus iniectio* under which class they should be put.

A *l. Vallia*¹, probably early in the second century B.C., made all *manus iniectio pura* except on actual judgment and under the *l. Publilia*. Thus they all became simply actions for double damages *contra infitiantem*.

The opinion that *manus iniectio* was grouped with the other *modi lege agendi* because, in the long run, if disputed by a *vindex*, it would lead to litigation, though maintained by high modern authority, is not acceptable. There seems no good reason for so limiting the early use of the word *actio*: *manus iniectio* is grouped with the other *modi* as being a formal process under the *lex*, for the enforcement of a right.

155. *PIGNORIS CAPIO*². This was seizure of property of a debtor to put pressure on him. It has all the appearance of a very primitive institution, hardly a legal institution at all, but as we see it in the sources it was carefully regulated. It occurred only in a narrow group of cases. The seizure was out of court, with no intervention of a magistrate, and the debtor need not be present. It might be on *dies nefasti*. But, like all other *legis actiones*, it involved the use of a prescribed form of words, *certa verba*. According to Gaius, it was allowed by custom (*mores*) to soldiers, if the wage (*aes militare*), or money to provide a horse for an *eques* (*aes equestre*) or fodder (*aes hordearium*) was not provided by those responsible. By the XII Tables it was given against one who bought a beast for sacrifice and did not pay the price, or hired a horse from one who had let it to secure money for sacrifice, and did not pay the hire, and by a provision of the Censors, to a *publicanus*, a taxfarmer, for unpaid taxes. One or two other cases are found about the close of the Republic, but it is not clear that they have any relation to the *legis actio*. It seems probable that the list of Gaius is exhaustive for early law and that the view sometimes maintained that *pignoris capio* was a general remedy, these being only instances, is untenable.

¹ G. 4. 25.

² G. 4. 26-29.

What happened after seizure is not clear. It is noticeable that in all the cases there was no other remedy, and it seems to be by reason of the public or religious interest concerned that the remedy was given. The money for the soldier was not due to him but to the State: the tax was not due to the publican, but to the State. Sale and hire were not then enforceable contracts. The seizure of a pledge is in itself a poor remedy, and there is no sign of a right of sale. There may have been a right of destruction, which is what happened when the State seized a pledge and got no satisfaction. It has however been maintained that there was an action to compel the debtor to redeem the pledge, and this is used to account for the fact that *pignoris capio* is among the *modi lege agendi*. The suggestion is not necessary: *pignoris capio* is placed there as being a formal process under the *lex* for the enforcement of a right.

The *legis actio* appears to have been the only form of civil process available between *cives*. So long as the Latin League lasted it was available between members of States in the league and after the destruction of the league (B.C. 337) it was available to members of Latin communities, and even to *peregrini* where there was a treaty to that effect. How cases concerning peregrines not so privileged were tried is not known.

The *legis actio* was a procedure of private law. On disputes between the State and a *civis* there was no appeal to the courts: the State enforced its own justice by administrative measures. Commercial dealings between the State and *cives* were common: leases of lands, mines or quarries, contracts for supplies, etc. If a debtor did not satisfy the State's claim, a pledge might be seized and ultimately destroyed: if he still defaulted, his goods were seized and sold. Redress for injustice in such matters was only by criminal proceedings against the magistrate for misconduct in his office.

156. Such a system as the *legis actio* was unsuited to any but a very undeveloped community. It was intensely formal, encumbered with a mass of ritual acts and words, and extremely rigid. If a claim could not be stated in one of the forms elaborated by the Pontiffs, on the words of the *lex*, there was no remedy. And the slightest error in any detail of the ritual caused loss of the action¹. It is true that the lack of elasticity might be somewhat modified by the ingenuity of the Pontiffs. But they were patricians, and

¹ G. 4, 11.

any manipulation of the procedure would be mainly in patrician interest. And the magistrates who administered the law were also patricians. It followed that the *legis actio* was prominent in the long struggle between the orders. As, one after another, the magistracies, and finally the pontificate, were thrown open to plebeians, the plebeian grievance grew less. The publication, at about the same time, of the various legal forms by Gn. Flavius, and the practice of giving open instruction in law, initiated not long after by Tiberius Coruncanius, the first plebeian *pontifex maximus*, practically did away with it altogether¹. But the changes which might have reconciled the plebeians to the system made it useless to the patricians, and it had now no advantage to set off against its inconvenience to everybody. Yet it was more than a century after the last of these events before the *legis actio* was even partially displaced by the *formula*. The delay may have been in part due to a certain simplification within the *legis actio* itself. The *legis actio per condictionem*, the last mode to be introduced, was relatively free from ritual and, though it covered only claims *in personam*, it may have been utilised, by the ingenious device of *actiones per sponsionem*, to simplify real actions. Where property was in dispute, one party made the other a promise of a small sum if his claim was unjustified (*sponsio praeiudicialis*), and at the same time the party in possession gave security modelled on that of the old *praedes*, for the *res* and interim profits (*satisfactio pro praede litis et vindictiarum*). Then, an action was brought, by *condictio*, on the promise. The decision on this really decided the main question, and, if it was against the possessor and he did not hand over the property, proceedings would be taken against the sureties. The amount of the *sponsio praeiudicialis* was indifferent: it was not actually exacted. But the system is actually known to us only in the formulary procedure².

The Praetor's interdicts, which in the formulary system were an important agency for the enforcement of existing law and the creation of new rights, were operative under the *legis actio*, at least for the former purpose. These too were tried by *sponsiones*, i.e., by what was practically a bet on the question whether the interdict had been obeyed or not.

About the middle of the second century B.C., the Formulary

¹ *Ante*, § 6.

² G. 4. 91.

System was introduced. It resembled *legis actio* in one main feature: there was, first, a procedure *in iure*, before a magistrate, and then reference to a *iudex* or other tribunal to try the case, procedure *in iudicio*. But the handling of the matter *in iure* had a different character. Instead of ritual forms and *certa verba*, there was now a discussion by the parties, supervised by the Praetor, and leading to the issue of a written *formula*, stating the issue and instructing the *iudex*, and expressed in very technical and precise language almost every word of which is important. The Edict contained model *formulae* for the different kinds of claim, and these might be varied, with the approval of the Praetor, so as to state the exact issue—*concepta verba*, as opposed to *certa verba*. From historical causes, not fully known, the Praetor early acquired an immense power, by means of his Edict, not only over the details of procedure, his immediate province, but over the substantive law. He gave actions where the law gave none (*actio fictitia, in factum*), refused them where the law gave them (*denegatio actionis*), and allowed, by *exceptio*, defences not known to the existing law. It is a debated point whether these powers or any of them existed under the *legis actio*, but, at the least, they were vastly more important under the new system. With this new system there was a mode of procedure capable of meeting all needs, and it continued to be the main system of procedure throughout the great age of law.

The question of the source of the new ideas expressed in this system is obscure. The practice of instructing the *iudex* in writing, inevitable, in view of the more complex issues now submitted to him, may have been suggested by provincial practice, where it is found very early. It may have come in through the peregrine Praetor, in whose procedure it is said, though evidence is slight, that the *recuperatores* were instructed in writing. It is clear that this Praetor, dealing with members of various communities, must have had a more elastic system of pleadings than those in the *legis actio*. But our information does not justify a strong opinion on these points.

The question how the new system came to be law is answered by Gaius. He tells us¹ that the *Formula* superseded the *Legis Actio* as the result of the *l. Aebutia* (circa 150 B.C.) and the *ll. Iuliae iudicariae*, under Augustus. He does not tell us what part each of

¹ G. 4. 30, 31.

these played, and there are different opinions. On one view, the *l. Aebutia* substituted *formula* for *legis actio* in *condictio*, and the *leges Iuliae* generalised this. One variant of this opinion supposes the Praetor to have applied it on his own authority in other cases. On another, more widely held, the *l. Aebutia* authorised the *formula* in all cases, but did not forbid the *legis actio*, so that suitors could proceed in either way, and the *ll. Iuliae* abolished the *legis actio* altogether. In any case, after the *ll. Iuliae*, the *formula* was the normal mode of procedure, the *legis actio* being retained, says Gaius, only in fictitious litigation (*cessio in iure, manumissio vindicta*), as an alternative in *damnum infectum*, where it was not used, suitors preferring the praetorian machinery, and, the only real survival, in cases to be tried by the *centumviri*, a tribunal which existed till the end of the second century of the Christian era.

157. THE FORMULARY SYSTEM. The procedure by *formula* normally began by *in ius vocatio* (though *vadimonium*, now by *stipulatio*, was sometimes, by agreement, substituted for it), with *missio in possessionem* if the defendant hid and so made it impossible. If he did not appear under the *vocatio*, or give a *vindex* for his appearance¹, there was an *actio in factum* and other machinery. The *vindex* was liable if he did not produce his man. On appearance, the plaintiff stated his claim and demanded his *formula* (*actionis editio, impetratio*). As many defences were possible besides denial of the claim (*exceptiones*), and there might be limitations of liability not allowed for by the plaintiff (e.g. *beneficium competentiae*), there might be much discussion before the *formula* was settled. If this involved adjournments there would be *vadimonium*. The *formula* as settled would be issued under the Praetor's authority, i.e., offered by the plaintiff, accepted by the defendant, and approved by the Praetor, not as stating correctly the issue between the parties, but as stating an issue which could properly be submitted to the *iudex*. The whole jurisdiction being in theory based on consent, there was a *negotium* between the parties, of which the *formula* expressed the terms, and the view which seems best to explain the rules which we shall have to consider, as to the subsequent proceedings, (though it is not undisputed), is that the transaction was in effect a contract between them. Whether the identity of the *iudex* was a part of this contract is not clear.

¹ D. 2. 8. 2. 5.

The issue and acceptance of the *formula* constituted *litis contestatio*, the very important effects of which stage we shall have to consider later. It is probable that a separate direction to act (*iudicare iubere*) was issued to the *iudex*, with a copy of the *formula*.

There were possible complications of the procedure *in iure*. In some actions (*actiones interrogatoriae*), the plaintiff might question the defendant on certain points affecting his personal liability. Thus, in noxal actions, he might ask if the defendant had *potestas*. If this was denied, but the plaintiff did not believe the denial, he could have a *formula* with no right of noxal surrender, so that if *potestas* were proved, there was a liability *in solidum*. There were analogous rules in actions against *heredes*, who might be asked if they were *heredes* and for what share¹.

In some actions, apparently only actions for a certain sum of money, the plaintiff might put the defendant to his oath (*iusiurandum necessarium*)² whether the money was due. If he took it, the action failed: if he refused it he was condemned. He might however do neither, but offer it back (*referre*) which gave the plaintiff a similar choice, with similar results, but no right to offer it back again. In noxal actions, where *potestas* was denied, an oath might be offered instead of claiming the *formula* above mentioned, but it could not be referred back, and there was a somewhat similar possibility in the *actio rerum amotarum*. In some of these cases there was the further complication of a *iusiurandum de calumnia*, but this we will not discuss.

If liability was admitted, and the claim was for a *certum*, this was equivalent to judgment—*confessus pro iudicato habetur*³. If the claim was for an *incertum* the *confessus* was, it seems, treated as an *indefensus*, unless he gave full security, but there is some obscurity about this. An *indefensus* was one who would not take the steps required by the action, e.g., would not give security where this was wanted, or would not accept a *formula* (*accipere iudicium*). If the claim was for a *certum*, he was *pro iudicato*: if for an *incertum*, there would be *missio in possessionem*, with an ultimate *bonorum venditio* unless he took the proper steps. All this refers to *actio in personam*: a *confessus* or an *indefensus* in a real action was not *pro iudicato*: he was in the same position as if the case had gone before

¹ D. 11. 1. 5. etc.² D. 12. 2. 7.³ P. 5. 5a. 2.

the *iudex* and he had made a *pronuntiatio* in favour of the plaintiff. This was the preliminary to actual judgment: its nature and effect will be considered later.

158. After issue, the *formula* went to trial before a *iudex*, an *arbiter* or, in some cases, *recuperatores*. The plaintiff proposed names to the defendant till one was chosen: he could not refuse to act, and he was sworn¹. There was little difference in this system between *iudex* and *arbiter* and it is not very clear when the latter was used: apparently it was in cases involving a wider discretion, e.g. *bonae fidei iudicia*. Both were chosen from the *Album iudicum*. Till near the end of the Republic, the list contained, normally, all the qualified members of certain high classes of society. There were many changes, due to party politics, about the end of the Republic. The list included senators, *equites* and, for a time, some others, and, early in the Empire, persons of lower rank were permanently added for minor cases. But the *equites* seem to have been pre-eminent among the *iudices*. The list did not now include all qualified persons: a selection was made and amended, as need arose, from year to year. *Recuperatores* were not necessarily taken from the *album*. They did not act singly, but as a small jury, and were now used in some cases, but it is not clear what, between *cives*: apparently it was mainly in those with a certain delictal character.

With the structure of the *formula*, the instructions of the *iudex*, we shall deal later. It normally imposed on the *iudex* the duty of either condemning the defendant to a money payment or absolving him. But we shall see that there were many other orders or directions which he might have to give in the course of the proceedings, and there were cases in which there was no *condemnatio* or *absolutio*, but only a finding (*pronuntiatio*) that such and such were the facts (*praeiudicia*). The hearing might take more than a day, adjournments being to the next day but one. The rules of evidence were lax: almost any sort of evidence might be given, but that of slaves was not usually admitted, and where it was allowed, it was by torture. A slave could not give evidence against, or after about A.D. 150, for, his master. If the plaintiff was absent at the hearing, the defendant must be absolved. If the defendant was absent, and did not send an explanation or ask for an adjournment, it is usually held, though it is not clear, that the *iudex*, after making

¹ D. 5. 1. 39.

attempts to find him, and waiting till four, must condemn him. But it may be that he was entitled to do so but need not.

The *formula* controlled the *iudex*, and his *prima facie* duty was to decide the matter as it stood at *litis contestatio*, disregarding later events. This was an inheritance from *sacramentum*: the question whether a man's *sacramentum* had been *iustum* could not be affected by later happenings. But in practice, this might work unfairly, and it was modified in many ways, some of which we shall discuss later. One case, of special importance, was satisfaction after *litis contestatio*. In *bonae fidei iudicia*, and in actions with an *arbitrium* clause, in which restoration with the consent of the *iudex* was a ground of absolution, the rule was not applied. But in *stricta iudicia*, which followed more closely the ancient principles, the Proculians held that the *iudex* could not take such satisfaction into account, but must nevertheless condemn. The Sabinians took the more reasonable view that, even here, the defendant was entitled to *absolutio*, and this view prevailed: it was expressed in the maxim "*omnia iudicia absolutoria sunt*¹."

Though the *iudex* must abide by the *formula*, a judgment not authorised by it was not necessarily void: if he exceeded the *certum* claimed or a sum fixed by a *taxatio*, the judgment was valid but he was liable for resulting damage as *iudex qui litem suam fecit*. But he had much discretionary power, summed up in the expression *officium iudicis*. In some cases he might, but need not, allow certain forms of set off. In some actions he had power to absolve the defendant on his restoring the disputed property. In other cases he could require security for certain purposes as a condition of absolution, or transfer of actions, one way or the other, as a condition of *condemnatio* or *absolutio*. The order itself must indeed be absolute², but it would not be issued till the transfer was made or the security given.

He was to condemn or absolve: if he could not make up his mind after repeated hearings, he might apply to the magistrate for release, on his swearing *rem non liquere*, and a new *iudex* would be appointed. The judgment, whatever it was, was given orally in court in the presence of the parties. If there were several judges, e.g. *recuperatores*, the majority decided: if there was no absolute majority either way, there must be *absolutio* except that in *causae*

¹ G. 4. 114.

² D. 49. 4. 1. 5.

liberales the decision in such a case must be for liberty¹, whether it was a claim of an apparent slave as a freeman or vice versa.

Absolutio ended the matter: there was no such thing as appeal. There might indeed be *restitutio in integrum*, where, e.g., a judgment or *confessio* was obtained by threats or fraud, but there was no power to take the case before a higher tribunal on the ground that the decision was wrong. All that could be done, if a judgment was wrong, was to utilise administrative machinery, e.g., induce a magistrate to veto further proceedings, and there is little sign even of this. But an absolved defendant might have redress for a false claim. There were proceedings for *calumnia*² on proof that the claim was in bad faith, and, in a few cases, of which *iniuria* was the most important, even without that proof.

We have noted that in some actions there was no *condemnatio* or *absolutio* but only a *pronuntiatio* of a fact, e.g., that *X* was or was not a *civis*, or a *libertus*. Apart from this case, *condemnatio* was always for a sum of money, either fixed in the *formula* or assessed by the *iudex*. In noxal actions there was a *condemnatio* for money, but there was another way out: the *condemnatio* by the *iudex* expressly provided that the defendant need not pay if he preferred to surrender the wrongdoer, a *facultas solvendi*. This must be distinguished from the restoration which might be ordered in some actions by the *iudex*. If that was done, there was no *condemnatio*. The *iudex*, having made a *pronuntiatio* as to the rights of the matter, could, if he chose, order restoration (*arbitrium iudicis*) and if this was done the matter ended. It must also be distinguished from the *adiudicatio* in the divisory actions: this was a decree of the *iudex* vesting in one or other of the parties a divided share of the property to be distributed. It was quite independent of the *condemnatio* for contribution for expenses or proceeds or for equalisation, which, probably, was no part of the action in its original form.

159. If the *condemnatus* failed to satisfy the judgment, the next step was enforcement. This was begun by another action, the *actio iudicati*, after a delay of at least thirty days. If this was not defended, execution proceeded. If it was defended, which could be only on the grounds that there was no judgment, or that it was invalid or was satisfied, there would be a *iudicium* as in other

¹ D. 42. 1. 38. pr.

² G. 4. 172-181.

actions; but before the *formula* was issued, the defendant had to find a surety who became responsible for double damages on failure. All this machinery was devised by the Praetor: it is clearly modelled on the old *manus iniectio*. The forms were different but the essence was the same: appearance before the magistrate, and no defence except through the intervention of a third party, willing to undertake double liability¹.

The actual execution might be in either of two forms, personal seizure or seizure and sale of the debtor's property, *bonorum venditio*, the former probably used if the defendant was merely recalcitrant, the latter if he was insolvent. Personal seizure was authorised by the magistrate (*duci iubere*), and though the old formalities were gone, its effects were like those of the old *manus iniectio*: the debtor was kept in restraint, must be fed, and might, presumably, work out the debt. It does not seem that seizure barred the other mode, *bonorum venditio*², which was purely praetorian.

On the creditor's application, the Praetor issued a decree of *missio in possessionem*. The creditor could then take possession for custody, and post notices of the seizure (*proscribere*). After thirty days, authority was given to summon a meeting of creditors to elect a *magister bonorum* to sell the property. On the appointment, the debtor became *infamis*. After further delay, giving other creditors a chance to come in, there was a sale of the goods *en bloc*, by auction, the bidding being not of a price, but of a dividend on the declared debts, the property being knocked down to the bidder of the highest dividend (*bonorum emptor*). The sale did not affect the rights of pledgees, and some privileged debts were first paid in full, so far as the assets would go. Creditors who had not come in had no claim against the assets sold, but, as the debtor had not suffered *capitis deminutio*, they could claim against later acquisitions, as could those who had come in, on the unpaid part of the debts, subject to *beneficium competentiae*, i.e., a right not to be condemned beyond his means for a year. We have discussed the legal position of *bonorum emptor*, in dealing with "universal succession."

Confessus certi was in the same position as *iudicatus* in this matter, and so, in the long run, were *confessus incerti*, if he did not give security, and *indefensus*, though the *missio* was primarily intended

¹ G. 3. 78.

² G. 3. 77-80; ante, § 94.

to induce them to take the proper steps in the defence. The same procedure lay against a debtor who absconded or hid, so that proceedings could not be brought against him (*latitare*). It was the Roman equivalent of modern bankruptcy. In all cases, if the debtor was a *pupillus* or *absens reipublicae causa*, though there might be *missio in possessionem*, the Praetor would not authorise sale, the estate being administered in the meantime by a *curator*. If a deceased left no *heres* there might be *bonorum venditio*, the delays being shortened, apparently by half.

The process was modified if a debtor voluntarily surrendered his estate to his creditors. A *l. Iulia* under Augustus provided that one who thus made *cessio bonorum* would not become *infamis*, was never liable in future beyond his means, for the old debts, and was not liable to personal seizure thereafter in respect of them¹.

Where a debtor was a *clara persona*, a senatusconsult of the first century provided an alternative mode of execution. After the decree of *missio in possessionem*, instead of a *magister* to sell the estate, the creditors might appoint a *curator*, to sell what was enough to satisfy the debts (*distractio bonorum*). The debtor did not become *infamis*. The choice being with the creditors, the restriction to *clarae personae* tended to disappear.

It might happen that none of these steps would be taken. In circumstances to be considered later, a defendant might have to find personal surety for the amount of the judgment (*satisfactio iudicatum solvi, pro praede litis et vindictiarum*). If he was insolvent, it would be more profitable for the creditors to bring action against the sureties.

The Praetor was not the only magistrate with *iurisdictio*. The Aediles had jurisdiction in some cases. In the provinces, the *praeses* was chief magistrate. In Italy, outside Rome, there was for a time a practice of sending *praefecti iuri dicundo* to certain towns to hold assizes, exercising all the powers of the Praetor, but they no longer appear in the Empire. Municipal magistrates had a limited jurisdiction but no *imperium*. Thus *missio in possessionem* and *bonorum venditio* had to be referred to Rome, as had all cases over the limit of their jurisdiction, their only power in such matters being to take security (*vadimonium*) for the defendant's appearance at Rome.

¹ G. 3. 78.

160. THE SYSTEM OF *COGNITIO EXTRAORDINARIA*. The Formulary procedure was known as *Ordo Iudiciorum*. In that of later law the whole matter was tried out before the magistrate, with no reference to another court for hearing: it was a *cognitio* by the magistrate not following the *ordo iudiciorum*, and hence called *cognitio extraordinaria*. In all communities, in all ages, some questions in which private citizens are concerned are settled by administrative officials. Such a system has advantages from the government point of view, and in Rome there was a gradual extension of this method till it covered all litigation. One result of the change was that the notion of jurisdiction as resting on consent, unreal even under the *formula*, completely disappeared, and the conception of *litis contestatio* as a contract, though it left many traces in the rules, practically died out also. But though in effect, whether in original intent or not, litigation became administrative, it was still judicial: the main rules of procedure remained, modified of course from time to time. The new system had the advantage from the Emperor's point of view, that the administration of justice was now wholly in the hands of officials appointed and controlled by him, and not in those of private *iudices* over whom he had no direct control.

In the Republic, the various orders of the Praetor, *missio in possessionem*, *restitutio in integrum*, interdicts, etc. may be regarded as administrative, though the further proceedings were litigation, tried in the ordinary way. But the *duci iubere* of the *actio iudicati*, *denegatio actionis*, etc., were entirely his act. It was not, however, till the time of Augustus that the new system became important. The recently introduced *fideicommissa* were to be adjudicated on by the consul, a jurisdiction soon transferred to a *Praetor Fideicommissarius*¹. *Honoraria* in mandate were recovered by *cognitio*. The nomination of tutors, provision of *alimenta* and of *dos*, overdue *fideicommissa* of liberty, were all handled administratively, and there were other cases. In the latter part of the second century, cases hitherto tried by the *centumviri* were dealt with by *cognitio*. By this time the *cognitio* system was general in imperial provinces and in Egypt, and, a little later, it was applied in all the provinces.

The magistrate was a busy officer: he could not try all cases himself. He therefore commonly appointed deputies (*iudices pedanei*) who tried cases from beginning to end. In A.D. 294

¹ In. 2. 23. 1; ante, § 82.

Diocletian forbade this delegation¹ except in actual urgency, a reform rendered easier by the fact that provinces were now much smaller. Italy was now a group of provinces and, though the order applies only to the provinces, where it presupposes the *cognitio* system, it is improbable that things were different in the city itself, where the republican magistracies had long been in process of decay. There is in fact no trace of the old *unus iudex* in Rome after about A.D. 250.

161. COURSE OF PROCEEDINGS. *In ius vocatio* and *vadimonium* as a substitute were superseded by *litis denuntiatio*, followed up by a statement of the case. This, in turn, was superseded, probably before Justinian, by a summons issued by the magistrate after submission of a statement of claim (*libellus conventionis*) which was officially communicated to the defendant. A later day was fixed for appearance, security for which was taken by the official. Before that date the defendant's reply (*libellus defensionis, contradictionis*) must be submitted. Even under the new system the claim apparently stated the case on the plan of the *formula* till A.D. 342².

If the plaintiff did not appear on the appointed day, the case was dismissed; but there was nothing to prevent a fresh action. If the defendant did not appear, the sureties might be proceeded against or there might be actual compulsion. There was in fact a great deal of legislation as to the effect of evasion of summons or failure to appear at various stages in the process. There was a procedure *in contumaciam*, with repeated notices or proclamations, and, in the long run, with considerable delays, the recalcitrant defendant would usually be condemned in default. But the effect varied at different times and in different actions. If both parties appeared, each stated his case, and the completion of this process was *litis contestatio*. But Justinian, who required both parties to take an oath against *calumniā*, fixed *litis contestatio* at the moment when these oaths had been taken, and, a little later, at the moment when the parties had signed their *libelli*. But as we have seen in dealing with joint liability, and shall see again, *litis contestatio* was far less important under Justinian than it had been in classical law. Changes in detail of procedure were endless: only a few of them can be noted. The old notions of *dies fasti* and *nefasti* were of course

¹ C. 3. 3. 2.

² C. 2. 57. 1.

obsolete: the available days were changed from time to time. Decisions on *exceptiones* might be given before the final judgment—what we should call interlocutory decisions. Some, e.g. those dealing with capacity of parties or competence of court, bar by lapse of time, etc., could be dealt with before *litis contestatio*, and, conversely, *exceptiones peremptoriae*, e.g. *exceptio doli*, could be introduced after *litis contestatio*, and this *exceptio* did not always, if proved, cause loss of the action. The court sat in private. There was no longer a class of *actiones interrogatoriae*, but in any action, at any stage, on any point, an *interrogatio* might be put by leave of the court, but the answer, or refusal to answer, had no decisive effect. Similarly, by leave of the court, an oath (*iusiurandum*) might be submitted in any action, at any stage on any point, with a right to refer it back, the result being as in earlier law except that as it might be on a particular point it did not necessarily decide the whole action. Adjournments were to a day fixed by the *iudex*, not necessarily the next day but one.

The Praetor having disappeared, jurisdiction in the capitals was normally in the *praefectus urbi* and *vicarius urbis*, subordinate *praefecti* having special jurisdictions. Outside the capitals it was in the *Praeses*, though, as before, there were local tribunals with limited jurisdiction. The delegation to a *iudex pedaneus*, forbidden by Diocletian, save in urgent cases, was later reintroduced for minor cases. These deputy judges were drawn from the advocates practising in the courts: there came to be a regular list from which the *iudex* for a case was chosen by the magistrate, perhaps with co-operation of the parties. They had the powers of the magistrate, up to and including judgment, but they had nothing to do with execution of it. The judgment was publicly read in court. It must be unconditional. It was not now, necessarily, for a sum of money: it might be for actual delivery of the disputed property or for other forms of satisfaction. The subordinate elements, *pronuntiationes*, *adiudicationes*, *taxationes*, had their place now as formerly, but they were no longer, as some of them had been, instructions to the *iudex*.

A feature apparently introduced by Justinian, though, he says, justified by Papinian¹, was *condemnatio* of the plaintiff. If a defendant was absolved, the judge might condemn the plaintiff

¹ C. 7. 45. 14.

for anything that appeared to be due from him in the same transaction. It is indeed held by some writers (the point will recur) that in some of the contractual actions of classical law the same was true: the issue was so framed as to direct the *iudex* to condemn either party to pay whatever might prove to be due to the other.

162. APPEAL AND EXECUTION. The fact that the judge was now an official, who had a superior, opened the way to a system of appeals, which might in important cases go, ultimately, to the Emperor himself, who, in the later Empire, appointed delegates to try it. There might be appeals from decisions of interlocutory points, though these were discouraged and were practically forbidden in the time of Justinian. He also provided that there could be only two appeals from a judgment. The court of appeal from a final decision either confirmed or altered the previous decision: it did not refer the case back to the lower court.

If the final decision was *absolutio*, the matter was ended, subject to the possibility of proceedings for *calumnia*. If it was *condemnatio* and was not satisfied, there would be execution on the judgment after certain delays. This was changed in character. Personal seizure seems to have survived into this period but died out. *Bonorum venditio* does not seem to have survived the formulary system. There was no longer any *actio iudicati*. If the judgment was for a specific thing this was seized by officials and handed to the plaintiff. In other cases the officials seized property to satisfy the claim (*pignus ex causa iudicati captum*¹) and sold it at auction, after some delay. If the proceeds were insufficient, there were further seizures. Where there were several judgments, or a debtor was clearly insolvent, the system of *distractio bonorum*, which we spoke of as applied in earlier law to *claræ personæ*, was utilised. After a decree of *missio in possessionem*, a *curator bonorum* sold the property in detail and divided the proceeds as under the system of *bonorum venditio*. *Cessio bonorum*, leading up to *distractio*, still existed.

The Emperor might intervene in litigation otherwise than as the final court of appeal. As magistrate, he might sit as a court of first instance, his decisions being unappealable and apparently creating binding precedents. He might be consulted by a magistrate (*consultatio, relatio*) on a knotty point in a case before him and

¹ C. 8. 22. 2.

would reply by a rescript, either deciding the point, or, more commonly, laying down a principle on the disputed point and remitting the case. Sometimes, especially where a decision was unappealable (e.g. of the *praefectus praetorio*) there might be a similar *relatio* after judgment, in which case the rescript was in effect a judgment on appeal. How far such rescripts were sources of law we have already considered.

His intervention might be similarly caused by the *supplicatio* of a private person. Where, from any cause, injustice was being done, or was likely to be done, owing, for instance, to oppression by a *potentior*, and all attempts to obtain justice by the ordinary procedure had failed, a *supplicatio* might be made to the Emperor, who might issue a rescript delegating some person to go into the matter. But the details, and even the principles of this procedure by rescript are imperfectly known.

CHAPTER XVII

ACTIONS. STRUCTURE OF THE *FORMULA*. INCIDENTS OF PROCEDURE. PRAETORIAN REMEDIES

163. STRUCTURE OF THE *FORMULA*¹. Where we speak of rights and duties, the Roman Law spoke of Remedies, and Maine observes that the substantive law of early civilisations, "has at first the look of being gradually secreted in the interstices of procedure," and illustrates the proposition from Roman Law. Though this vivid phrase may contain an exaggeration, it expresses the truth that the key to a system of rights is the system of remedies. The structure of the *formula* repays close attention, since it expresses, by variations in its wording, the specific differences between the rights to be enforced, the different degrees of discretionary power in the *iudex*, the various limitations which may exist on the amount of damages, and the defences, if any, which must be expressly claimed to be admissible. As the *formula* had long been obsolete, Justinian's compilations do not preserve the passages in juristic writings dealing with the *formula*. The Digest does indeed incidentally tell us much, but the main source of our knowledge is the relatively full exposition in Gaius.

He tells us that the parts of the *formula* were *Demonstratio*, *Intentio*, *Adiudicatio* and *Condemnatio*. These are not all the parts, and except the *intentio* none of them is found in all *formulae*. His meaning seems to be that these were essential in the sense that any *formula* in which they occurred would be meaningless without them, while the absence of any other part, though it would alter the effect of the *formula*, would not make nonsense of it.

To the *formula* is prefixed the *nominatio iudicis*, or *recuperatorum*, which can hardly be called a part of the *formula*, but rather its address.

*PRÆSCRIPTIO*². This preliminary part might appear in one of its applications in almost any *formula*. Gaius tells us that there were two types. *Praescriptio pro actore* was for the protection of the plaintiff, to limit what was brought into issue. Thus, action on a *stipulatio* for a number of periodical payments would bring into

¹ G. 4. 39-52.

² G. 4. 133.

issue, and consume the right of action on, the whole *stipulatio*, though not all the instalments were yet overdue. To prevent this, and limit what was submitted to the *iudex*, the words "*ea res agatur cuius dies fuit*" were prefixed. So, on any breach of a contract, limiting words might be prefixed, that *litis contestatio* should not consume the right of action for other breaches. Where, e.g. on a sale of land, the vendor delivered but failed to mancipate, the form was "*ea res agatur de mancipando fundo*." There were other forms of *praescriptio pro actore*, hardly distinguishable from *demonstrationes*. Thus, in actions against a *paterfamilias* on the contract of a *filiusfamilias*, or in actions against sureties, there was a *praescriptio* stating with whom the original contract was made.

Praescriptiones pro reo were used before *exceptiones* were invented, to raise the defences which in classical law were raised by *exceptio*. We know little of this early stage, but there is record of *praescriptio praeiudicii*, the suspension of a particular action, lest decision on it should prejudice one of more importance or more comprehensive. Thus *vindicatio* of what might be recovered by *hereditatis petitio* was barred by this *praescriptio*. But this type of *praescriptio* was obsolete before Gaius: the so-called *praescriptio longi temporis*, which is found later, does not seem to have been a *praescriptio* in the formulary sense at all. It is uncertain whether *praescriptio pro reo* operated like *exceptio*, so that, on proof, the action was lost and could not be renewed or whether it had the effect, if moved, of nullifying the whole proceeding, as the effect of *praescriptio pro actore* suggests.

*DEMONSTRATIO*¹. This was a statement of the nature of the matter which was to come before him, to act as a guide to the *iudex*, e.g., "*Quod Aulus Agerius Numerio Negidio hominem vendidit*." Usually, no doubt, the fact alleged was in itself undisputed, but this was not necessarily so, and the mere allegation would not dispense with proof if it were challenged. As the *demonstratio* was inserted for convenience, it did not occur in real actions or in actions *in factum*, for, in these, the *intentio* gave the necessary information. It was found in *bonae fidei iudicia*, for there, as we shall see, the *intentio* gave no guidance. It occurred in the *actio ex stipulatu*, but, apparently, not in the *actio ex testamento*. Oddly enough, it did not appear in *condictio certae pecuniae*, where, as the *intentio*

¹ G. 4. 40.

did not state the *causa*, it would seem to have been very desirable. Whether it appeared in *condictio triticaria* or *condictio incerti* is not clear.

Since the *demonstratio* was to state what was submitted to the *iudex*, if it wholly misstated the matter, or made an excessive allegation, though the action would fail, it could be brought again, the real issue not having been effectively submitted, so that *litis contestatio* had not operated on it—*falsa demonstratione rem non perimi*¹. This effect was the logical result of the words at the end of the *demonstratio*, "*qua de re agitur*," or the like, which formed a connecting link with the *intentio*.

164. *INTENTIO*². This was the most critical part of the *formula*. It stated precisely the issue to be tried, and as error in it on a material point would be fatal, and the action, once brought, could not be brought again (subject to praetorian relief in certain cases), it was drawn with great care. Its normal scheme was "if you find such and such points proved." In real actions it ran: "*si paret rem* (e.g. *hominem Stichum*) *Auli Agerii ex iure Quiritium esse*," with no reference to the defendant. In actions *in factum* it began "*si paret*" and then stated the hypothesis of fact on which the claim rested. Actions *in personam* were of many types. Those for *certa*, which were all *stricta iudicia*, began "*si paret*" and those for *incerta* "*quidquid paret*." In some *stricta iudicia* the *causa* was stated, e.g. in *actio ex stipulatu* and *ex testamento*: in others, e.g. *condictio certi*, it was not. In actions *in personam* the names of the two parties were stated: the model *formulae* call the plaintiff *Aulus Agerius* (*ago*) and the defendant *Numerius Negidius* (*nego*). In all *bonae fidei iudicia* the *intentio* contained the words "*ex fide bona*," which, as we have seen, widen the discretionary power of the *iudex*. The *intentio* ended with a statement of the obligation. In claims for *certa* this ran "*dare oportere*." In contractual and quasi-contractual claims for *incerta*, it normally ran "*dare facere oportere*," though in some actions, perhaps only the divisory actions, it ran "*praestare oportere*." In the *actio furti nec manifesti* (*furti manifesti* was *in factum*), there was a statement of what was stolen with the words "*pro fure damnum decidere oportere*." The form in the Aquilian action is not known. It is possible, that in some actions "*facere oportere*" was the form.

¹ G. 4. 58.

² G. 4. 41, 45 sqq.

It has been maintained that in some actions there was no *intentio*. This has been asserted of the divisory actions and of the *actio iniuriarum*, but the point in both cases seems to be purely verbal. In both cases the *intentio* is combined with another part of the *formula*: in the divisory actions, with the *adiudicatio*; in the *actio iniuriarum*, with the *condemnatio*. Conversely, there were actions which had nothing but an *intentio*, after the *nominatio iudicis*. These were the *actiones praeiudiciales*, e.g. to determine a question of *status*, preliminary to further litigation. They seem to have been in the form of a question put to the *iudex*, e.g. "*an pareat Titium libertum Auli esse*," or the like, but the form is not certain.

165. *EXCEPTIO*¹. This was a defence which did not deny the *prima facie* claim, but alleged some circumstances which excluded it. In form it was a product of the Edict, but the defence to which it gave effect was not necessarily praetorian. Some *exceptiones* were based on *leges*, e.g. *l. Cinciae*, *l. Plaetoriae*; some on *senatus-consulta*, e.g. *sci. Macedoniani*, *Velleiani*; some on imperial enactments, e.g. the *exceptio* under Hadrian's *beneficium divisionis*. But there were a great many *exceptiones* which were purely praetorian, e.g. *doli*, *metus*, *pacti conventi*, *rei venditae et traditae*, and so forth. Many of them have been considered in dealing with substantive law, but there are two or three of which the importance was purely procedural, which must be mentioned here. The *exceptio cognitoria*, *procuratoria*, was used where a representative was suing, in the manner shortly to be considered, and it was alleged that he was not qualified. The *exceptio litis dividuae* lay where a man, having a divisible claim, e.g. on a single sale of two things, sued for one only. If he sued for the rest in the same magistracy he was met by this *exceptio*. The *exceptio rei residuae*² lay in the same way where one who had several claims against the same man brought action only on some of them. The *exceptio rei iudicatae vel in iudicium deductae* will be considered in connexion with *litis contestatio*.

The *intentio* raised a hypothesis on which the *iudex* was to condemn: "if you find such and such to be due" or "whatever you find to be due." The *exceptio* expressed another hypothesis which was to create an exception to this: it accordingly said "unless you find so and so," beginning therefore with *nisi*, *si non*, *si nihil* or the like, e.g. "*si nihil in ea re dolo malo Agerii factum sit neque fiat*,"

¹ G. 4. 115-129; In. 4. 13, 14.

² G. 4. 122.

the *exceptio doli*; or "*nisi inter eos pactum sit ne peteretur*," the *exceptio pacti*. The burden of proof of the *exceptio* was on the defendant, the so-called *exceptio pecuniae non numeratae* not being really an *exceptio* in the procedural sense at all.

An *exceptio*, like the *intentio*, was liable to be met by a reply which admitted its truth, but alleged some circumstance which destroyed its force. This was called a *replicatio*, and there might be *duplicatio* and *triplicatio*. The *replicatio* is sometimes called *duplicatio*¹. A simple instance of *replicatio* was fraud pleaded in reply to an *exceptio pacti*. After "*nisi inter eos pactum sit*" etc. would come "*aut si in eo pacto aliquid dolo malo Negidii*," etc. But there could be no *replicatio* to an *exceptio doli*.

If the *exceptio* was proved and not met by a successful *replicatio*, the action was lost, for the *iudex* was to condemn only "*nisi*" the allegation in the *exceptio*. We shall see later that some applications of the *exceptio doli* have been supposed, but erroneously, to involve an exception to this. The *beneficium competentiae* was enforced by what texts call "*exceptio quod facere potest*," and this only reduced the *condemnatio*. It was not, however, really an *exceptio* but a *taxatio*.

While some, perhaps the majority, of the *exceptiones* might be called equitable, many clearly were not, and in discussing *bonae fidei iudicia* we saw that it was only the defences based on equitable *exceptiones*, *doli*, *metus*, *pacti*, etc., which might be raised therein without being claimed in the *formula*.

Exceptiones were classified in various ways. The most important distinction was between *exceptiones peremptoriae* (or *perpetuae*) and *dilatoriae* (or *temporales*). They were alike in that, if inserted in the *formula* and proved, they destroyed the action, and with it the right. But they differed in that the first group were available whenever the action was brought, e.g. *doli* (in normal applications), *metus*, *rei iudicatae*, etc., while the others were available either only within a certain time, e.g. *litis dividuae*, *rei residuae*, *pacti*, where it was for a time, etc., and thus could be avoided by delaying the action, or only against a particular party, e.g. *exceptio cognitoria*, and could be avoided by changing the representative. They were *dilatoriae* in the sense that threat of them would cause the plaintiff to withdraw proceedings before *litis contestatio*, with a view to

¹ G. 4. 126, 127; In. 4. 14.

renewed action later, without the defect. The *exceptio doli*, though normally *perpetua*, was sometimes used as an *exceptio dilatoria*. As we shall see, it was the machinery by which a plaintiff could be compelled in later classical law to allow for certain forms of set off. Akin to this distinction is that between those *personae cohaerentes* and those *rei cohaerentes*, the former being available only to particular defendants, e.g. where there was a pact not to sue, confined to one of several persons liable.

Some *exceptiones* were set out in the Edict, in *edicto propositae*, including most of the well known *exceptiones*. Others were *causa cognita datae*¹. This class included some which were standing institutions; but, as they were not given as a matter of course, could not be absolutely promised in the Edict. Such were the *exceptio iusti dominii* in the *actio Publiciana*², and others which were modifications of standing *exceptiones*, e.g. the *exceptio* stating the facts complained of which was used as a substitute for the *exceptio doli*, where the plaintiff was the patron, the *exceptio doli* not being allowed against him. Indeed an *exceptio* alleging the facts complained of could always be used instead of *doli*, which simplified the task of the *iudex*. Such *exceptiones* were sometimes called *exceptiones in factum*, an unfortunate name, since nearly all exceptions were allegations of pure fact.

166. *CONDEMNATIO*³. The direction to condemn or absolve. The simplest form was that on a claim for a *certum*: "*iudex Negidium Agerio HS D condemna, si non paret absolve.*" For an *incertum* it would run "*quanti ea res est tantam pecuniam...cond. s. n. p. a.,*" with slight variations according as it was a *strictum iudicium*, or *bonae fidei*, or *in rem* or *in factum*. In some cases it was "*quanti...est,*" in others "*quanti...erit*" or "*fuit,*" according as the value was taken as at *litis contestatio* or as at any other date. In the group of actions "*in factum in bonum aequum conceptae*" it ran "*quantum tibi bonum aequum videbitur, tantam pecuniam*" etc.

It will be noticed that, grammatically, the *condemnatio* hangs directly on the *intentio*: "*si paret...condemna, si non paret absolve.*" The *exceptio* does not fit neatly. The reason is that, as we have seen, in the original scheme of the *formula* there was no *exceptio*, but a *praescriptio*, and the *exceptio* was rather inartistically substituted for it.

¹ G. 4. 118.² D. 17. 1. 57.³ G. 4. 49-52.

In classical law, every action except *praeiudicia* had a *condemnatio*: but it is fairly clear that in earlier times, before allowances were made in them for expenses and other *praestationes*, the divisory actions¹ had no *condemnatio*, but only an *adiudicatio*.

The *condemnatio* was always for a fixed sum of money². We have seen that in some cases it produced the further effect of *infamia*. It should be noted that this happened only where a man was personally condemned for his personal wrong, not, e.g., if a *heres* was condemned as such, or a *cognitor* was sued and condemned: here there would be no *infamia*, for the *cognitor* had done no wrong and the wrongdoer was not in fact condemned.

The *condemnatio* might contain a number of accessory clauses.

(a) In noxal actions, as we saw, there was a *facultas* of noxal surrender, so that the *condemnatio* ran "*tantam pecuniam dare aut noxae dedere*."

(b) *Clausula arbitraria*. In some actions the *condemnatio* clause contained a power to the *iudex* to order restitution, and to condemn only if this was not obeyed. The form was "*nisi arbitrato tuo restituat*," or the like. If it was disobeyed, the plaintiff was allowed to estimate the value, under oath (*iusiurandum in litem*) and *condemnatio* proceeded for that amount. But this mode of estimation, as to which we are told that the plaintiff's veracity was not closely scrutinised³, and which was intended to put pressure on the defendant, was not allowed unless the refusal was in some way wilful. Even so the *iudex* need not allow it, but might make his own estimate. In later law he might fix a maximum, and even ignore the estimate when made.

The *arbitrium* clause occurred in all real actions. Notwithstanding the letters *N. R.* inserted in the wrong place in the *formula in ius* given by Gaius for deposit, and the fact that some texts speak of restitution as avoiding condemnation in deposit⁴, it is generally held that it did not occur in *bonae fidei iudicia* for *dare facere*. There was no use for it in claims of *certa*. It is recorded in the *actio ad exhibendum*, and in a number of actions *in factum*, but it is by no means clear that all these applications are classical, or that in all cases there was the machinery of *iusiurandum in litem*. There were actions which had incidents somewhat resembling

¹ *Ante*, §§ 50, 123.

³ D. 12. 3. 11.

² G. 4. 51.

⁴ D. 16. 3. 1. 21.

this *arbitrium* but really distinct. Thus noxal surrender is rather like it but was fundamentally different: it was a *facultas* embodied in the *condemnatio* as pronounced, not an alternative to it, and there was no question of a discretionary power in the *iudex*. The *actio de eo quod certo loco* is called *arbitraria*, but it was so in an entirely different sense: the *iudex* had power to decide what allowance was to be made where what was due in one place was sued for in another.

(c) *Taxatio*¹. A limit on the amount of the *condemnatio*. It might be a fixed maximum, which might apparently be inserted in all contractual and quasi-contractual actions for an *incertum*, other than deposit and similar actions aiming at restitution, but it is not clear when it was compulsory. In delict, it seems to have been compulsory in *iniuria*, and there was something of the sort in *furtum*, but it is possible that here the value had to be stated in the *intentio* or a *demonstratio*. Another type of *taxatio* was the limitation to a certain fund, as in *de peculio*, "*duntaxat de peculio et de in rem verso*." The *beneficium competentiae* is of similar type: its words are uncertain, probably "*duntaxat in id quod facere potest*" or the like.

(d) *Adiudicatio*. This occurred in the divisory actions: the form in Gaius is: "*quantum adiudicari oportet, iudex Titio adiudicato*." This combines the *intentio*. It is certainly imperfect and perhaps corrupt, for unless there was a distinct *formula* for each party the word *Titio* is inexplicable, and even if there were, Titius is not a name used for the party in model *formulae*. There have been many conjectures as to the correct reading.

(e) *Deductio*. This will recur: here it is enough to say that when a *bonorum emptor* sued a debtor to the estate he was bound to allow for any debt the other way, and that this allowance was stated in the *condemnatio*.

167. *LITIS CONTESTATIO*. Incidental reference has been made to the effect of this important stage. This must now be considered in more detail. The main effects were:

(i) Destruction of the old obligation². In *legitima iudicia, in personam, in ius*, the *obligatio* was destroyed *ipso iure*, so that a fresh action would be lost whether the point was actually raised in the *formula* or not. In all other actions the bar was, at least in form, praetorian, and the point had to be raised by the *exceptio rei*

¹ G. 4. 51.

² G. 3. 180, 181; G. 4. 106, 107.

iudicatae vel in iudicium deductae. Under the *legis actio*, the bar had been *ipso iure*, resting not on the notion of *novatio necessaria*, but on a simpler notion: *non bis in idem*. This was indeed the basis under the *formula* in real actions, where there was no *obligatio* to novate, and in actions *in factum* where no *obligatio* was stated. It is an obscure and debated point why in real actions the bar was by *exceptio*.

As every *res iudicata* must have been *in iudicium deducta*, it is not plain what was the use of the provision for *res iudicata*. We shall not consider the various explanations. It was formerly held that there were two *exceptiones*, but the dominant view now is that the whole was stated in the Edict as one *exceptio*, of which the party might use whichever part was appropriate to his defence. *Res iudicata* would be the most important: it was but rarely that an action would be brought while another on the same point was pending.

The distinction between *ipso iure* destruction and bar by *exceptio* might be practically important. If the action was absolutely barred there was no more to be said, but there might be a *replicatio* to the *exceptio*. It is to be noted that the point in the defence was the fact that there had been a judgment, not the content of the judgment. It might happen that the former decision was against the defendant who pleaded it in the later action. But there are signs of another use of the *exceptio*, in which the content of the judgment was material. *A* recovered a *res* by *vindicatio* from *B*. *B* then vindicated it from *A*. *A* could plead the *exceptio rei iudicatae* though the issues in the two cases were not the same. In the first, the question was whether it was *A*'s: in the second, whether it was *B*'s. But the judgment that it was *A*'s proved that it was not *B*'s. A judgment the other way would have proved nothing in the second action: proof that it was not *A*'s was no proof that it was *B*'s. But this so-called positive function of the *exceptio* raises many difficulties.

For the *exceptio* to be available, the persons, the *causa* and the *res* must be the same¹. *Res inter alios acta nemini nocet*, but the matter of identity is not quite simple. It was juristic identity, not physical. This covered successors in title, surety and principal, *cognitor* or *procurator*, with some restrictions, and *correi*. A few

¹ G. 3. 180, 181; G. 4. 106, 107; D. 44. 2.

cases in which judgment had a wider effect we shall omit. On the other hand, physical identity was not conclusive: a man who had sued as tutor was not barred personally.

Causa here means basis of claim, *res* means the thing claimed, the distinction being somewhat obscured by texts which speak of *eadem res* in a wide sense, including *causa* and *res*. It must be, as it was sometimes put, *eadem quaestio*¹. The issues in the two cases must have been such that a decision on the first was necessarily a decision on the second. The action need not be the same; *actio redhibitoria* for a defect barred a subsequent *actio ex empto* on the same point. Unless it was, as it might be, expressly confined to a particular title, a real action brought into issue all existing rights and grounds of liability. Thus it could be brought again on a title which had accrued since the earlier action, or where the defendant had subsequently acquired possession of the thing. But the notion of *eadem res* raises many difficult questions.

Though the right was destroyed by *litis contestatio*, there was relief in some cases. All the ordinary grounds of *restitutio in integrum* applied here, *dolus*, *metus*, minority, etc. and there might be *restitutio* where an *exceptio peremptoria* had been omitted by mistake, or where the action was lost for overclaim (*plus petitio*). Where an *actio de peculio* had not given full satisfaction as there was not enough in the fund, the action might be brought again by *restitutio*, *aucto peculio*, or against others who might be liable, e.g. other joint owners².

Legitima iudicia having disappeared in later law, there was then no *ipso iure* destruction. Justinian abolished altogether the novatory effect of *litis contestatio* as against other persons, where several were liable or entitled. No known enactment abolished it as between the same pair of litigants, but it is fairly clear that it was gone under him. *Res in iudicium deducta* does not appear as a defence in his books, and it is possible that in practice the bar had already died out.

- (ii) It created a new obligation, to satisfy the judgment.
- (iii) All actions, after *litis contestatio*, were transmissible.
- (iv) Parties or *iudex* could not be changed except by *restitutio (translatio iudicii)*.
- (v) The *res*, in real actions, became a *res litigiosa* and inalienable.

¹ D. 44. 2. 3.

² D. 15. 1. 30. 4, 32. pr., etc.

(vi) The effect on *usucapio* and *praescriptio* has already been considered¹.

(vii) It fixed the subject matter of the claim: in principle, things were to be decided as they were at *litis contestatio*. The rule, *omnia iudicia absolutoria*, modifies this greatly. So too the value was to be taken as at that time (*quanti ea res est*) but there were many cases in which this was not true (*quanti ea res fuit, erit*). Lessening or increase of value after *litis contestatio* ought not to affect the liability, but, apart from *culpa*, a *bona fide* defendant was not liable for deterioration and must not profit by increase in value. We have seen that *stricta iudicia* and those *bonae fidei* differed in their rules as to fruits and interest from *litis contestatio*. In fact, there were so many variations from this principle (we have seen some of them) in *bonae fidei iudicia* and actions *in factum* that the rule is not of much use as a guide.

168. *PLUS PETITIO*, *MINUS PETITIO*². The *iudex* was to condemn if the *intentio* was proved, and only then: he must therefore absolve if something less was proved, e.g. claim of ten, proof of nine. *Plus petitio* might be *re*, claiming too much, *tempore*, claiming too soon or, in later law, pending a condition, *loco*, claiming at *A* what was due at *B*, or *causa*, ignoring any right of choice in the debtor. In a claim, *quidquid paret*, there could be no *plus petitio re*, and Gaius says there could be none at all. But it seems that there must have been *plus petitio* if *A* bringing against *B* a *strictum iudicium* on a contract giving him a choice of two *incerta*, claimed only one of these.

Plus petitio in the *intentio* lost the action and, apart from praetorian relief, destroyed the right. In the *demonstratio* it equally caused loss of the action, but, apart from doubt in some infaming actions, it could be renewed, on the view that if the *demonstratio* did not state the real *obligatio*, this had never been submitted and so could not be novated. The principle is more obviously applied where the wrong thing was claimed. The claim failed, but the correct claim could be brought afterwards. *Plus petitio* in the *condemnatio* was simply amended.

Minus petitio, claiming too little, did not lose the action or prevent later action for the rest, subject to the *exceptio litis dividuae*. On the view which prevailed, *minus petitio* in the *demonstratio* had

¹ *Ante*, §§ 47, 49.

² G. 4. 53-59; In. 4. 6. 33, 34.

the same effect, but Gaius held that, like *plus petitio* in the *demonstratio*, it simply nullified the proceedings. In the *condemnatio* it bound the plaintiff.

These distinctions disappeared with the *formula*. Zeno provided¹ (A.D. 486), that for *plus petitio tempore*, the plaintiff must wait twice the time, lose interest and pay the costs of the abortive action. It is possible that he was only regulating details of a system already in existence. *Minus petitio* the *iudex* was to ignore, condemning for the right amount. For other *plus petitio* Justinian provided² that it was to be ignored, the *iudex* condemning for the right amount, the plaintiff being penalised in costs.

*COMPENSATIO*³. Set off. Where *A* sued *B* for a debt, the fact that *A* owed *B* something was, for strict law, irrelevant; the one claim could not be set off against the other. In *stricta iudicia*, which were on unilateral transactions, the counterclaim must obviously be on a different transaction, and the two could not be treated as one. There were, however, exceptions. If an *argentarius* sued his debtor he could claim only the excess of this debt over what he owed the debtor, in the same kind, i.e. in this case usually money. It was *plus petitio* not to make this allowance. There was no difficulty, for bankers were account keepers for their customer, and commonly knew more about his affairs than he did. This rule, of *compensatio*, was an edictal precaution due to the ascendancy of bankers in commerce. Similarly the Edict required a *bonorum emptor*⁴, suing a debtor to the insolvent estate, to deduct from his claim anything due in any way from the estate to him, as justice required, for, otherwise, he would get only a dividend on his debt. But as the *bonorum emptor* did not know the state of the account he had not to run the risk of *plus petitio*: he had to make, not *compensatio* in the *intentio*, but *deductio* in the *condemnatio*. This, as we know, could be amended.

In *bonae fidei iudicia*, the rule was simple. The words *ex fide bona* enabled the *iudex* to take into account any counterclaim arising out of the same transaction. It need not be stated in any way and there was no question of *plus petitio*.

Such was the law when Gaius wrote. But, not long after, M. Aurelius, so Justinian tells us, allowed *compensatio* in *stricta*

¹ C. 3. 10. 1.

² C. 3. 10. 2.

³ G. 4. 61-68; In. 4. 6. 30.

⁴ *Ante*, §§ 94, 159.

iudicia, the defendant being entitled to claim it by *exceptio doli*. As these were on unilateral dealings, it must have been in a different transaction. There could thus be no question of *plus petitio*, indeed if omission of it was *plus petitio*, there would have been no need of *exceptio doli*. Moreover the defendant need not raise it and could still sue independently for it, which he could not if it had necessarily been in issue, as the notion of *plus petitio* implies: there would be an *exceptio rei iudicatae*. If the defendant did raise it and it was accepted by the *iudex* or rejected as non-existent, this was *res iudicata*. But the successful *exceptio doli* would involve loss of the action, on the logic of the *formula*. Still this is not expressly stated, and it is sometimes held that here this was disregarded and the effect was reduction. But the other view seems preferable and is more widely held.

It is possible that this system disappeared with the *formula*, and that, in the procedure by *Cognitio*, *condemnatio* was simply reduced. However this may be, Justinian provided¹ that the judge might, in all actions but deposit and that for recovery of land wrongfully occupied, allow a set off of any kind, provided it could conveniently be estimated, and reduce the *condemnatio* accordingly: *actiones ipso iure minuunt*. Here too if the *iudex* took the set off into account and accepted it, or rejected it as not proved, there was *res iudicata* on this as well as the primary claim, but if he refused to go into it or the defendant did not raise it, it was unaffected. The words *ipso iure* do not mean that the set off operated as a matter of course, but only that it need not be expressed in the pleadings. There was thus no "necessary" set off in general in Roman Law. There was an approach to the principle in the rule of the *actio de peculio* that the fund was automatically reduced by debt due from it to a member of the *familia* and in the rule of the *actio rei uxoriae* that "*impensae necessariae dotem ipso iure minuunt*"². But the exact effect of this rule is controverted.

169. REPRESENTATION IN LITIGATION³. *Cognitores*, *Procuratores*. The representation here intended is not advocacy. It is the appearance, as a party, of someone not the real principal. In the *legis actio* this was in general impossible: *nemo pro alio lege agere potest*. We are told of certain exceptions. A *l. Hostilia* allowed *actio furti* on behalf of a captive, or one absent on State affairs, or

¹ In. 4. 6. 30; C. 4. 31. 14. ² D. 23. 4. 5. 2. ³ G. 4. 82-88; In. 4. 10.

their ward. It was also allowed "*pro populo*," which seems only to mean that anyone might bring an *actio popularis*, "*pro tutore*," which may refer to the *crimen suspecti tutoris*, and "*pro libertate*," which refers to *adsertio libertatis*. This restriction refers to the process *in iure*, the true *legis actio*: it was permitted to the aged and infirm to appoint *cognitores* for the procedure *in iudicio* and it is sometimes said, on little evidence, that such *cognitores* could be appointed in any case. This *cognitor* of the infirm for the *iudicium* may be the germ of the formulary *cognitor*, the only one of which we have real knowledge. But this representative was appointed for the whole process, *in iure* and *in iudicio*. The *tutor* and the *curator prodigi* or *furiosi* could represent their wards, and the rules were much the same as those for an appointed *procurator*, whom we shall shortly consider. Whether *curator minoris* was in the same position in classical law is doubtful, though he was under Justinian. It was of course possible to appoint him as an actual *cognitor* or *procurator*, which would not have been possible, in view of their incapacity, to the other subjects of wardship. Corporate bodies, e.g. Municipalities, could not act personally, but they could appoint *actores* for any given case, and, in later law, permanent officers for the purpose, more usually called *syndici*. These also were on the footing of *procuratores*. We shall consider only *cognitores* and *procuratores*.

The *cognitor* is the older, but the less formally appointed *procurator* is found early in the Empire, and ultimately superseded the *cognitor*. Not everyone could be, or appoint, a representative: the Edict contained several provisions on the point, involving complete or partial exclusion of various persons. The objection to them might be taken *in iure* or by *exceptio cognitorea* or *procuratoria*, but from the language of Justinian, who abolished these *exceptiones*, it seems that they had long been out of use: probably in the *cognitio* system the objection was taken at the outset.

A *cognitor* was appointed in the presence of the other party. If he was not present the appointment was not operative till he accepted. There were formal words of which Gaius gives two variants, probably one for use out of court and one in court. *Procuratores* were appointed informally, and might even act without appointment (*procurator voluntarius*, *defensor*), but all must be done before *litis contestatio*. The Rutilian formula in use made it clear in what capacity the party appeared. As the *condemnatio* was

in the name of the representative, logic required that the judgment should go for, or against, him and its consequences affect him and not the principal. But, from very early times, a *cognitor* for a plaintiff was so far a representative that he consumed his principal's right of action and, in his case, the Edict gave the *actio iudicati* to or against the principal, whether with a formal *translatio iudicii* or not is not certain. If the *cognitor* was on the defendant's side, since the plaintiff's right was necessarily in issue and consumed, he had to give security that his principal would ratify his action (*cautio de rato, rem ratam habiturum dominum*). A *procurator* did not bring his principal's claim into issue under the Edict, and thus one for plaintiff or defendant had always to give security *de rato*, under the Edict, and he, not his principal, was liable or entitled to the *actio iudicati*. But, by the time of Severus¹, the *procurator* appointed so as to shew that he had *plena potestas agendi* brought his principal's right into issue, and, with formal *translatio iudicii*, the *actio iudicati* lay for and against the principal, so that *cautio de rato* was no longer needed. In later law the *cognitor* had disappeared, and a fully empowered *procurator* represented the principal for all purposes. But if he was a mere volunteer, or his authority was not perfectly clear, he was himself liable and the *cautio de rato* was still necessary.

170. SECURITY IN LITIGATION². The plaintiff did not, in general, give security. In classical law, the defendant in a real action gave security in one of two forms. If the case was tried by *sponsio*, he gave security *pro praede litis et vindictiarum* (modelled on that of the ancient *praes*), obsolete in later law, and with a content not certainly known. Substantially it was a promise by *stipulatio* of a surety, for the value of the thing and its profits, for due performance of the necessary procedure, and against fraud. If the process was by the more usual *formula petitoria*, he gave similar security, *iudicatum solvi*, i.e. to satisfy the judgment, to defend the action, i.e. to take the proper procedural steps, and against fraud. In claims *in personam* security *iudicatum solvi* was needed in a few actions (Gaius mentions *iudicati*, *depensi* and *de moribus*, the list being probably exhaustive) and where a defendant had fraudulently made away with his property, or was already bankrupt, or was a *heres* whose solvency was doubtful (*heres suspectus*).

¹ C. 2. 12. 10; V. 317.

² G. 4. 88-102; In. 4. 11.

Under Justinian, as judgment would be for the *res* itself, and the litigation made it inalienable in any way, while the personal actions which needed security were obsolete, all this system was gone. Defendant must indeed always give *cautio iudicio sisti*, to an amount and in a form varying with circumstances, but this was only the modernised form of the old *vadimonium*.

As we have already seen, the matter was more complex where a party acted by representative. *Cognitor* for plaintiff gave no special security, but *procuratores* and others gave, in the time of Gaius, *cautio de rato*. We have already mentioned the disappearance of this requirement for fully authorised representatives. It required surety and involved the undertakings that the principal would ratify and would not renew the action, and against *dolus*. It became void so soon as the principal expressly ratified. But security *iudicatum solvi* was always required if the defendant acted by representative. For a *cognitor* the principal gave it: in other cases, the representative. It seems to have been needless in later law, since the judgment produced precisely the same effect as if it had been given against the principal himself, but the rule remained under Justinian, though there were changes in detail. If the principal was present, he himself gave security *iudicatum solvi* and *cautio iudicio sisti* and he had also to give a hypothec over his property: in other cases, the representative gave security *iudicatum solvi*.

171. PRAETORIAN REMEDIES. As we know, the Praetor's *iurisdictio* covered much besides the general supervision of the proceedings *in iure*. Something must be said of praetorian remedies other than ordinary actions. In general, these proceedings led to actions tried in the ordinary way; nevertheless in many cases he exercised powers involving the actual decision of points at issue, by virtue of his *imperium*. The giving of a new *actio in factum* and *denegatio actionis* are such exercises of power, but the four cases which we have specially to consider are *Restitutio in integrum*, *Missio in possessionem*, *Stipulationes praetoriae* and Interdicts.

*RESTITUTIO IN INTEGRUM*¹. This was an exercise of *imperium* by which the Praetor caused to be treated as non-existent some event which had altered the legal position of the applicant. It was of great importance, since it definitely set aside a right which had

¹ D. 4. 1; P. 1. 7.

been acquired. It was on a level, in fact, with his power of giving an action where the civil law gave none, but more elastic, since, though it might have precisely that effect, as the evil to be remedied might be the result of any sort of act, the relief would vary in form. If, e.g., property had been transferred, there must be an action for its recovery: if a right of action had been acquired, there must be a defence. But *restitutio* was not merely denying or giving an action or an *exceptio* in opposition to the civil law or the standing Edict. The name was applied to a decree issued after enquiry held on the application of the person affected. The application must usually be within an *annus utilis* from the cessation of the circumstances which justified the application, e.g. from the time when minority or absence, or duress, ceased, a limit extended by Justinian to four *anni continui*. There must be shewn some serious damage to property rights, in the wide sense, including *obligatio*, resulting from some transaction or event which had legal results. There must be no other available remedy. Thus there was no *restitutio* from a marriage, as it could be set aside at will, but there might be as to the accompanying *dos*. There was no *restitutio* from a *manumissio*, this being always irrevocable. We are told that there could be none from a *mutatio status*¹. An *adrogatus impubes* could, in certain circumstances, compel *emancipatio*, but this was not *restitutio*: it was a civil process and did not annul the transaction *ab initio*. There is indeed a text which says that a minor "*circumventus*" in his *adrogatio* could get *restitutio*², but it stands alone.

The grounds of *restitutio* were numerous. *Dolus*, *metus* and error in procedure (*plus petitio*, omission of *exceptio peremptoria*) have been discussed.

Minority. The damaging act must not have been confirmed since the minority ceased and must not have been due to the minor's wrongdoing. It was not enough to shew that it was a bad bargain: it must appear that the damage was due to inexperience, *inconsulta facilitas*, but fraud on the other side need not be shewn. If indeed over-reaching (*dolus*) was shewn, this might itself be ground for *restitutio*: the minority would be immaterial.

Absence. Where owing to absence a right had become time-barred or an action was lost for non-appearance, there might be *restitutio* if the absence was compelled by fear, or was due to State service

¹ D. 4. 4. 9. 4.

² D. 4. 4. 3. 6.

or imprisonment or captivity, or there was similar absence by the other party, so that proceedings were impossible. The same edict provided for some other cases, e.g. inaction of a magistrate due either to *intercessio* of another or personal delay, and if the other party was one who could not be *in ius vocatus*.

Capitis minutio. We have already considered the remedies in such cases as *adrogatio* and passing into *manus*¹, where, it may be noted, there was no limitation to an *annus utilis*. A similar case was that of a noxal action where the slave was freed *pendente lite*.

Other cases were: alienation *mutandi iudicii causa*, i.e. transfer of property in dispute, e.g. into the hands of a "*potentior*," and change of parties to a pending suit, etc.

After the decree would come the question of the remedy, which varied according to the nature of the damaging legal event: if a right had been lost or property transferred, an *actio rescissoria*, *fictitia*, the fiction being that the event had not occurred. If an obligation had been undertaken, it would be an *exceptio* or *dnegatio actionis*, and so forth.

In general the relief must be claimed by the person affected or his "universal successor," but where it was for *dolus* or *metus*, and in some other exceptional cases, *restitutio*, obtained by these, released also sureties from the obligation undertaken. Conversely, it could ordinarily be claimed against the immediate beneficiary or his "universal successor," but not against others acquiring from him. But minors could get *restitutio* against any holder². We have seen that there was an exceptional rule in *metus*, and there were some other exceptional cases.

172. *MISSIO IN POSSESSIONEM*. This was a decree of a magistrate with *imperium*, entitling a party to a dispute to enter on certain property. As it was issued in many cases, and for different purposes, its effects were not always the same. In some cases it gave legal *possessio*; in others merely a right to enter on the property, usually with some right of administration. It might be of a man's whole property, or of a mass of property not necessarily his whole estate, e.g. a *hereditas* on which he had entered, or of some specific thing. On the face of it, it was provisional, a mode of coercion, but, as we saw in considering *bonorum venditio*, it might have definitive results. Thus, few general propositions can be stated

¹ *Ante*, § 93.

² D. 4. 4. 13. 1.

of the institution as a whole: the principal cases must be treated separately.

Of *Missiones in possessionem* of a man's whole estate, the most important group is that known as *rei servandae causa*. This term covered the various *missiones* in connexion with litigation, judgment and insolvency, with which we have dealt, leading usually to *bonorum venditio*, but, exceptionally, to *distractio bonorum* or only to *curatio bonorum*. The decree did not give legal *possessio*, but only a right to take charge, for custody and administration. Closely analogous are *missio in possessionem* of the goods of one "*qui vindicem dedit*" and did not appear and that of the creditors of one who had been adrogated or had passed into *manus*. With these may be contrasted the *missio in possessionem* introduced by Severus¹, where a tutor failed to make proper provision for the maintenance of his ward, which conferred actual legal *possessio*.

There were a number of *missiones* in connexion with *hereditas*, in which the *possessio* was not of the whole property of the person against whom it was directed, but of a whole *hereditas* acquired by him. Some of these were *bonorum possessiones decretales*, already considered², e.g. where a *heres* was as yet unborn (*ventris nomine*), where an *impubes heres* was alleged to be *suppositus* (*ex Carboniano edicto*), where the *heres* was a *furiosus*, and, probably, in classical law, yet other cases. Here there was actual legal *possessio*. Again, there was *missio in possessionem* of a deceased's estate to secure *dos*, and that given to *scriptus heres* under a will alleged to be *ruptum* or *irritum*, both giving only custody and right of administration, and both abolished by Justinian. There was also the *missio in possessionem*, already dealt with, where legacies were, for any reason, not paid. Of others, the only one needing mention is that over the *hereditas*, in *hereditatis petitio*, if the possessor evaded process, established by Antoninus Pius³, and having the rule that the *missus in possessionem* took the fruits without accounting for them, so that the defendant took nothing by his contumacy.

There were *missiones in possessionem* of specific things. If the *heres* sold what was left by *fideicommissum*, and the buyer knew of the trust, the fideicommissary could get *missio in possessionem* of it, and we are told (but the text is not very trustworthy) that the *res*

¹ In. 1. 26. 9; D. 26. 10. 7. 2.

² *Ante*, § 92.

³ D. 42. 4. 7. 19.

would be seized and handed over by officials. Justinian abolished¹ it: it was difficult to work, and his own remedies, already considered, were better. A more important case was that of *missio in possessionem damni infecti causa*². Where a man's property was endangered by the condition of his neighbour's, the Praetor, on application, would order that security be given (*stipulatio praetoria*) against the risk. If this was refused there would be a decree in *possessionem ire*. This authorised entry, but not ejection, and did not give legal *possessio*. If nothing was done, there would be a second decree, giving *possessio*, and praetorian ownership, which would ripen by *usucapio*.

STIPULATIONES PRAETORIAE. These were promises, sometimes with surety, sometimes without, imposed by the Praetor on a party to a dispute. Though in form contracts, and capable of being sued on as such, they did not really rest on consent, for their terms were formulated by the Praetor, and refusal to enter into them was met by various forms of pressure. Many of them we have met with in dealing with procedure, and there, as we saw, refusal made the party an *indefensus*, with *bonorum venditio* in prospect. Of the many others *stipulatio damni infecti*, and refusal of it, has just been dealt with. A tutor was sometimes compellable to give security "*rem salvam pupillo fore*." A legatee might be required to give security for return of whatever might be paid in excess of what was due, under the *l. Falcidia*, or for return of the legacy if the supposed *heres* was evicted. It might be required for *collatio bonorum* in *bonorum possessio contra tabulas*, and from usufructuary for return on expiration of the right. In all these cases, the remedy for refusal was denial of all actions for enforcement of the right. Of the other cases the only one which needs mention is *operis novi nuntiatio*³. If work was being done or projected on a man's land, of such a kind as to threaten serious nuisance to a neighbour's property, e.g. floods, or to interfere with his lights, the neighbour, after notice on the spot, might bring the *dominus operis* before the Praetor, who, if the protest seemed well-founded, would order a promise to be given not to do the work in such a way as to cause wrongful disturbance of the neighbour's enjoyment of his property. If it was refused, there was an interdict, or, in some cases, an *actio in factum*.

¹ C. 6. 43. 3.² G. 4. 31; D. 39. 2.³ D. 39. 1.

173. INTERDICTS¹. These were the most important of the praetorian remedies. In their origin, antedating the *Edictum Perpetuum*, they were orders, enforced, no doubt, directly, compelling obedience to civil law rules; and some of these, especially those relating to public order, the use of public ways and waters, and the like, appear in the Edict. The Interdicts, however, with which we are more directly concerned, are those material in private law, most of which, though not all, express rules created by the Praetor himself. Of purely civil rights, so enforced, may be noted the right conferred by the XII Tables to enter on a neighbour's land to gather one's fruits which have fallen there, enforced by the interdict "*de glande legenda*²."

If we look at the interdicts which were most prominent in private law, we may be inclined to think of an interdict as a provisional order, an order stabilising a certain state of things, pending further proceedings. This is however a mistake. It so happens that much the most prominent of the interdicts are those for the protection of possession, without reference to title. This protection is of course provisional, liable to be defeated by proof of title. The provisional nature of the protection is due not to any thing in the mode of protection, but to the nature of the right protected. It was equally provisional in late law, when the machinery was no longer interdict, but possessory action; but an action is not itself provisional.

Gaius treats interdicts under the general head of actions, using this term in the wide sense, as a process for the enforcement of a right. In the narrower sense it was not an action, but, as we shall see, a process leading up to a series of actions. It is unlikely that any genuine classical text spoke of a specific interdict as an action, though there are texts in the Digest which do so. But, by the time of Justinian, the so-called interdicts were all converted into actions in ordinary form.

Interdicts were classified from various points of view: the main classification was into Exhibitory, Restitutory and Prohibitory interdicts.

Exhibitory interdicts were orders to produce something in dispute, and ended with the word *exhibeas*. For the most important claims to production the *actio ad exhibendum* served³, and the

¹ G. 4. 158-170; In. 4. 15.

² D. 43. 28.

³ *Ante*, § 124.

interdicts had their main field in relation either to non-patrimonial rights (e.g. *quem liberum dolo malo retines, exhibeas*¹), or to cases like *de tabulis exhibendis*, for the production of the will of a deceased person, of which it could not be known till it was opened, who could bring *ad exhibendum* in respect of it.

Restitutory interdicts were orders to restore a thing or undo some unlawful act, and ended with the word *restituas*. Most of them dealt with interference with public rights, but some bore on the private law. Among these were *de precario*, for return of a *res* held *precario*, "*Quod vi aut clam*," for restitution of things taken, or undoing something done, by force or secretly, and "*Quorum bonorum*," etc. under a grant of *bonorum possessio*.

Prohibitory interdicts were prohibitions of some act, varying in form, but so far as they prohibited interference with enjoyment of a private right ending with the word *veto* (sometimes *vim fieri veto*). Apart from the numerous interdicts of this class protecting the enjoyment of public and private rights of way and the like, and some others, there were, as we shall see, prohibitory interdicts of great importance for the protection of possessory rights. These interdicts were also called *interdicta* in a narrower sense, the other two classes being also called *decreta*².

The peremptory form in which interdicts were cast is somewhat misleading. If an interdict was disregarded, the Praetor did not investigate the matter and punish the offender: there was a procedure, to be examined later in more detail, leading to an action or actions tried by a *iudex* in the ordinary way and resulting in *condemnatio* or *absolutio*. As the duty was created by the interdict alone, this was always very carefully drawn, so as to express precisely the conditions to be satisfied to make the order applicable. Thus interdicts were in effect conditional orders to do or not to do a certain act, provided such and such conditions of fact existed.

174. Interdicts were also classified as Possessory or non-Possessory, the former being those which had to do with the protection of *possessio*. These might be Single or Double, a distinction of great importance in the procedure. Possessory interdicts were classified as *Adipiscendae*, *Retinendae* and *Recuperandae possessionis causa*.

¹ D. 43. 29. 1. pr.

² G. 4. 140; In. 4. 15. 1.

Adipiscendae possessionis causa. These, as the name shews, were designed to enable one entitled to possession, not yet obtained, to secure it. An important example is *quorum bonorum*, issued to a *bonorum possessor*¹, and its form illustrates the care with which the interdict was framed so as to express the conditions on which the right to it depended, and to be ineffective if these were not satisfied. It ran, approximately, "*quorum bonorum ex edicto meo illi possessio data est quod de his bonis pro herede aut pro possessore possides possideresve si nihil usucaptum esset quodque dolo malo fecisti uti desineres possidere id illi restituas.*" Another of this class is the *interdictum Salvianum* to enforce the landlord's hypothec for rent.

Retinendae possessionis causa. These were to secure a possessor, whose title was disputed, in his holding pending further proceedings. But, in classical law, as we shall see, they protected the holder only if his holding was free from taint, as against the other party: so that they might actually transfer the holding to that other. Originally, no doubt, they protected in any case. There were only two main forms, *uti possidetis* for immoveables, *utrubi* for moveables. As we know them, their purpose was to determine which should have possession, and the resulting advantageous position of defendant in an impending real action. On the loser in the interdict, who would be plaintiff, would lie the burden of proof. There were variant forms where the right in dispute was not ownership but some lesser right, such as usufruct. Both these interdicts were *duplicia* in the sense that they were addressed to both parties, with resulting complications in the procedure.

Uti possidetis ran, approximately, "*Uti nunc eas aedes quibus de agitur, nec vi nec clam nec precario, alter ab altero possidetis quominus ita possideatis, vim fieri veto.*" Thus, if the actual possessor had taken it from the other *vi clam aut precario*, possession was given to that other.

Utrubi (for moveables) ran "*Utrubi hic homo quo de agitur maiore parte huiusce anni nec vi nec clam nec precario ab altero fuit quominus is eum ducat vim fieri veto.*" Thus it went to whichever had held it for the longest part of the past year, unless he had it *vi clam aut precario* from the other. In later law the difference between the two was gone: the actions which replaced the interdicts were both on the lines of *uti possidetis*².

¹ *Ante*, § 90.

² G. 4. 148-153; In. 4. 15. 4, 5.

Recuperandae possessionis causa, for recovering possession. The interdict *de precario* is a familiar instance. There were also the interdicts *de vi*. That *de vi cotidiana* ordered possession to be restored on application made within a year, where one had been ejected from land by force, provided the holding had not been *vi clam aut precario* from the ejector. That *de vi armata* for ejection by armed force, was without restriction of time and independent of defects in the holding. It will be seen that these interdicts might often be used as alternative to *uti possidetis*. Under Justinian the two interdicts *de vi* were fused, i.e. there was one action representing them both. The clause about *vi clam aut precario* had disappeared, and apparently the restriction to a year always applied¹.

There was a small group of interdicts (*quem fundum, quam hereditatem, quem usumfructum* and perhaps *quam servitutem*), either for recovering or for obtaining possession, called therefore *interdicta duplicia* (in another sense) and, in one passage, *mixta*, a name probably due to Justinian. A defendant in a real action had to give security: if he refused, one of these interdicts issued for transfer of possession to the other party². As the system of security which they enforced was obsolete in later law, these interdicts disappeared. 175. PROCEDURE UNDER INTERDICTS³. This was a complex matter, especially in double interdicts. That in single interdicts, the overwhelming majority, will be first considered. The interdict was issued to any applicant, without enquiry. There was no risk of injustice, for, as we have seen, it expressly stated in all cases the conditions in which alone it was operative. If the defendant conformed, the matter was over. But if there was a real dispute, if the defendant thought that the plaintiff's case did not satisfy all the requirements of the interdict, he would simply ignore the order. If, for instance, it was a prohibitory interdict, e.g. against interference with actual enjoyment of a right of way, and he disputed the plaintiff's claim that he had been actually enjoying to the extent required by the interdict, he would do some act of obstruction, purely formal, but enough to constitute the *vis* which the interdict *prima facie* forbade. This had of course nothing to do with the question whether the plaintiff was entitled to the right of way: the question was whether he had been actually enjoying it. The parties then went before the Praetor, and the question was raised whether

¹ G. 4. 154, 155; In. 4. 15. 6.

² *Ante*, § 170.

³ G. 4. 161-170.

there had been disobedience to the interdict. Disregard there had certainly been, but if, on the facts, the plaintiff had not been in substantial enjoyment, there was no disobedience, since the order was: "You are not to interfere with the right of way of which *A* has been in substantial enjoyment." The question was raised by *sponsiones*, i.e. a bet. The plaintiff *A* asked: "Do you promise me ten if you have disobeyed the interdict?" The defendant, *B*, said "I promise" and then asked: "Do you promise me ten if I have not disobeyed the interdict?" and *A* promised. Then a *formula* for *condictio certae pecuniae* was issued to each of them. It should be noted in passing that these *sponsiones* were not merely *praeiudiciales*, but *poenales*, i.e. they were actually exacted. In the action, the issue being precisely the same in both, the question would be decided whether there had been disobedience to the interdict; in other words, in the case we have taken, whether *A* had in fact been enjoying the right of way as the interdict required. If *A* failed, and still claimed a right of way, he must bring an action to recover it, in which he would have to prove title. If he won, a *formula* would issue for abstention from interference and damages in default. There would be nothing to try, but only a matter of assessment, in this further action, for the other had already decided the point; and it may have been issued at the same time as the others, to be used or not, as the case went. All this had settled nothing as to the legal right to the servitude. If *B*, the owner of the land, lost in the interdict because *A* had been actually enjoying, it was still open to him to bring an *actio negatoria* denying the servitude. If the question of title was what they really had in mind, the whole interdictal procedure was a move in the game, an endeavour to secure the *de facto* enjoyment so as to be in the position of defendant.

In restitutory and exhibitory interdicts (also called *decreta*) there was a possible variation. If the defendant, in court, after the act of disregard, preferred, he could refuse the *sponsio* and demand a *formula arbitraria*. The issue was precisely the same. There would be an *intentio*: "If it appears that *B* disobeyed the interdict, then, unless he restore at your discretion, condemn him, if it does not appear, absolve him." This had the advantage that it avoided the penal *sponsio* (*periculum sponsionis*), but as there would be the same power of ordering restitution in the *formula* issued under the *sponsio* system, that seems to be all the difference.

It will be seen that the cases to which this alternative system applied were those in which the order was for a positive act, not an abstention.

176. In the double interdicts, *uti possidetis* and *utrubi*, with their variants, the method is the same, additional complication being due to the fact that the interdict was addressed to both parties, with resulting duplication of some of the steps, and to the fact that the question of interim possession during trial of the interdict had to be dealt with. The interdict being issued, the parties (*A* and *B*) would proceed to use formal force against each other (*vis ex conventu*) amounting to disregard of the interdict by both of them. Then each would have to make *sponsiones* as to the disobedience, with four resulting *condictiones*, all having the same issue, since if one had disobeyed the interdict the other had not. Then the secondary question of interim possession had to be settled. This was bid for, and awarded to the highest bidder. There were then two courses, either to make a *stipulatio* of the amount of the bid, to be enforced if the decision in the interdict went against the interim possessor, leading to a fifth *condictio certi*, or to omit the *stipulatio* and take a *condictio fructuaria*, apparently for the value of the interim profits, *condictio incerti*, though it is possible that here too the claim was for the amount of the bid. Then there was a *iudicium secutorium* (*Cascellianum*) issued to the loser in the *licitatio*, for recovery of possession, if he won in the interdict. This action also covered the interim fruits, so that the interim possessor might have to pay for them twice, a check on reckless bidding. Here, as in single interdicts, the trial of one action settled all the legal points, the only thing left open being a possible question as to the value of the interim fruits under the *condictio fructuaria*, if the main judgment was in favour of the non-possessor. The *formulae* seem to have been issued all together.

As all litigation in the formulary system needed co-operation of the parties, there were, as we have seen, ways of putting pressure on a defendant who would not play his part. We know little of what took the place of this in interdictal procedure. In double interdicts there were *interdicta secundaria*, by which pressure could be put on a recalcitrant party. But we do not know if these applied to single interdicts or how they worked, a matter on which the most various views are held.

Under Justinian the old interdicts were long gone¹, with the *formula*, but the rules of law which they expressed remained. Instead of application for, and issue of, an order 'I forbid *B* to do so and so,' followed by the steps above set out, there was simply an ordinary summons and an action, under which the judge would try the question whether *B* had done so and so, and condemn or absolve accordingly. There is no obvious reason why it should not have been done in that way in the Edict; instead of an interdict, an edict saying, "if anyone does so and so, *iudicium dabo*." The explanation probably is that the power of issuing interdicts was older than the power of creating actions, and in the early days of the Edict was utilised as a simple way of doing this. Its retention throughout the formulary period was mere conservatism.

¹ In. 4. 15. 8.

APPENDIX

EXAMPLES OF *FORMULAE*

(Some of these can be no more than approximations, and in all cases there might be small variations in immaterial points.)

Vindicatio Rei.

Titius iudex esto. Si paret fundum Cornelianum quo de agitur Auli Agerii ex iure Quiritium esse, neque is fundus arbitrato tuo Ao. Ao. restituetur, quanti ea res erit, tantam pecuniam iudex Nm. Nm. Ao. Ao. condemna, si non paret absolve.

The same against one claiming to be bonitary owner.

T. I. E. Si paret f. Cornelianum q. d. a. Ai. Ai. ex iure Quiritium esse, nisi As. As. fundum q. d. a. No. No. vendiderit et tradiderit, neque is fundus arbitrio tuo Ao. Ao. restituetur, quanti e. r. e., etc.

Actio Publiciana. Defence that plaintiff is a *bona fide possessor* and defendant is *dominus*.

T. I. E. Si As. As. Stichum quem bona fide emit et is ei traditus est, anno possedisset, tum si eum hominem eius esse ex iure Quiritium oporteret, nisi homo q. d. a. Ni. Ni. ex iure Quiritium sit aut si Ns. Ns. Ao. Ao. hominem q. d. a. vendiderit et tradiderit, neque is homo... restituetur, quanti e. r. e., etc.

Action on *mutuum* (*actio certae pecuniae creditae*) with a pact not to sue.

T. I. E. Si paret Nm. Nm. Ao. Ao. HS CCL dare oportere, nisi inter eos pactum sit ne peteretur, iudex Nm. Nm. Ao. Ao. HS CCL condemna, s. n. p. a.

Mutuum. Defence that borrower was a *filiusfamilias*. Reply that he deceived the creditor.

T. I. E. Si paret Nm. Nm. Ao. Ao. HS CCL dare oportere, si in ea re nihil contra senatusconsultum Macedonianum factum sit, aut si in ea re aliquid doli mali Ni. Ni. factum sit, iudex Nm. Nm. Ao. Ao. HS CCL condemna, s. n. p. a.

Stipulatio for an *incertum* with an *exceptio doli*.

T. I. E. Quod As. As. de No. No. incertum stipulatus est cuius rei dies fuit, quidquid paret ob eam rem Nm. Nm. Ao. Ao. dare facere oportere, si in ea re nihil dolo malo Ai. Ai. factum sit neque fiat, iudex Nm. Nm. Ao. Ao. condemna, s. n. p. a. (There may have been a *taxatio*.)

Actio ex vendito.

Quod As. As. No. No. hominem Stichum vendidit, qua de re agitur, quidquid o. e. r. paret Nm. Nm. Ao. Ao. ex fide bona dare facere oportere, iudex duntaxat decem milia Nm. Nm. Ao. Ao. condemna, s. n. p. a.

Actio negotiorum gestorum, out of Rome. Defence, case already tried.

Quod Ns. Ns. negotia Ai. Ai. gessit, qua de re agitur, quidquid paret ob e. r. Nm. Nm. Ao. Ao. ex fide bona dare facere oportere, si ea res iudicata non est inve iudicium deducta non est, quanti e. r. e. tantam pec. iudex, etc.

Actio de peculio on loan to a slave.

T. I. E. Si pareret hominem Stichum qui in potestate Ni. Ni. est, si liber esset, dare oportere, iudex duntaxat de peculio et si quid dolo malo Ni. Ni. factum sit, quominus peculii esset, vel si quid in rem Ni. Ni. versum est condemna, s. n. p. a.

Actio furti nec manifesti. (Details doubtful.)

T. I. E. Si paret Ao. Ao. a No. No. furtum factum esse paterae aureae viginti solidorum plurisve, quam ob rem Nm. Nm. pro fure damnum decidere oportet, quanti ea res fuit cum furtum factum est, vel est vel erit, tantae pecuniae duplum iudex Nm. Nm. Ao. Ao. condemna, s. n. p. a.

Hereditatis petitio of the whole (Lenel).

T. I. E. Si paret hereditatem Lucii q. d. a. ex iure Quiritium Ai. Ai. esse, quod Ns. Ns. ex ea hereditate pro herede vel pro possessore possidet, neque id arbitrio tuo Ao. Ao. restituetur, quanti e. r. erit, tantam pec., etc.

Stipulatio for certa res (triticaria). Action brought by *cognitor*.

T. I. E. Si paret Nm. Nm. Ao. Ao. viginti modios tritici dare oportere, quanti ea res est tantam pecuniam iudex Nm. Nm. Titio cognitore condemna, s. n. p. a.

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